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MESSAGE FROM THE PATRON

NLUALR is the mirror of quality research orientation of students of NLUJAA. Like any other national Law University this University represents India miniature comprising talented students from all over the country pursuing multi discipline studies and forming inter disciplinary approach towards the attention drawing national issues. As good students acquiring and disseminating knowledge in different shades of life, the contributors to this journal are serving the great cause of societal aspiration to accomplish right to know more and more and update information regarding socio-legal problems and their solutions.

The very first issue of NLUALR left its unmistakable imprints on the legal fraternity and registered its noble presence in different libraries in the country. This issue covers a wide range of research area containing adequate and relevant data, appropriate analysis, thought provoking ideas and new insight along with deep vision into the socially desired pursuit of Justice. Articles published in this issue contain contribution both from faculty and students. Articles are full of information and critical evaluation ranging from indigenous problem of tribal people in Mizoram and Meghalaya to the finer issues arising out of interface between bio-diversity and intellectual property and registration of Geographical indications. The special feature of journal is the discussion threadbare of internationally significant issue of the Rohinngya, struggle for asylum in India. Case comments add more lively discussion on judicial creativity.

Less than a decade time in the life of a institution and even much less stating time of the Law Review is not enough to gain maturity. But the present NLUALR Vol. 2 No. 1 has left the mark of infancy far behind and shows maturity of thoughts, articulation, exposition and gives very apt expression to the ideas cropping up in the healthy minds of right thinking students conscious of their responsibility towards society adding name to the institution as a trend setter in the march of knowledge dissemination in the country.

The National Law University, Assam Law Review is the result of untiring and relentless efforts of the Editorial Board consisting of talented and good students devoting their precious time without impairing the high pursuit of learning and study. The students involved in publication of the Review and having taken keen interest in bringing out this issue deserve special congratulations.

As a patron of NLUALR, I wish all success to this issue and hand over to readers to read, evaluate, comment and encourage the budding scholars to work with new zeal for social service and community welfare through constructive, creative and innovative suggestion to solve social-legal problems and eradicate social evils.

MESSAGE FROM FACULTY ADVISORY BOARD

The National Law University and Judicial Academy, Assam has come out with the second volume of its student run peer reviewed journal. It is one of the flagship journals of our University that has helped towards providing a platform to the legal fraternity in giving a concrete form to their academic labours. Law plays a very distinctive role in maintaining and regulating the society in all spheres. Therefore it is very important that different stakeholders unite and collaborate on issues which confront the society and its growth. The Journal is a compilation of outstanding papers from numerous disciplines submitted by legal academicians, students and scholars associated with the legal and other disciplines. A remarkable breadth in terms of disciplines, experiences and backgrounds will help to enrich legal scholarship.

One of the key objectives of research should be its utility for the upliftment of the individual and the society. This journal attempts to capture and document debates around topics of law and other multidisciplinary fields such as Jurisprudence, Intellectual Property Regime, International Relations, Personal Laws, History, Economics etc. This journal is an endeavour of the University in incorporating different ideas into a single platform, with the sole aim of making a contribution towards legal scholarship and policy formulation.

Here, we would also like to acknowledge the guidance and support of our Patron and Vice-Chancellor, without whose support such an intellectual endeavour would not have been possible. We would also like to acknowledge the support of the Editorial Board for their hard work and dedication in bringing forth this issue. The journal has been fortunate to draw upon their individual and collective knowledge, talent and judgement in creating the compilation of this issue. We would also like to thank our esteemed Authors for their valuable contributions to our journal and hope to enjoy their support and contributions in the future.

Lastly, we would like to state that we are still a work in progress and have not yet covered a completely charted course in engaging actively with the legal academia. We are still seeking ideas from the community in terms of structure, goals and vision. At the same time, an enormous amount of work has been done towards bringing forth this issue and we hope that our efforts will be reflected in this edition. We shall welcome all valuable feedback and suggestions.

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Title: Mirage of Benefit Sharing in Biodiversity Laws and Its Possible Answer in Ancient India

Mr. Partha Pratim Medhi[1]
Ms. Dristirupa Patgiri[2]Abstract

Biodiversity and sharing of benefits arising out of genetic resources have captured the attention of the global community. Various International instruments call for the protection of biodiversity and benefit sharing at the global, national and regional levels. Indian legislators followed the principles evolved in the Convention on Biological Diversity, 1992 (CBD) and subsequently, the Indian Parliament enacted the Protection of Plant Varieties and Farmers' Rights Act (PPVFR), 2001 and the Biological Diversity Act, 2002 with an aim to conserve biodiversity and provide equitable sharing of benefits arising out of genetic resources. So far, the provisions of these statutes have failed to yield the desired results. It is pertinent to note that Ancient India was a storehouse of knowledge with its assortment of texts, contributed by several scholars, scientists, and philosophers from time to time. However, the treasure trove of this vast knowledge has been largely ignored by present-day scholars, researchers and policymakers. Possible answers of effective biodiversity conservation and benefit sharing of genetic resources may be discovered from this wealth of knowledge. The Ancient Indian philosophy regarding conservation of biodiversity and fruitful utilization of its resources is an example which can influence not only domestic legislation but also has the potential to persuade international policymakers to set a benchmark and achieve new heights in the sphere of sustainable utilization of genetic resources and achieve biodiversity conservation in the true sense. In this backdrop, this paper endeavours to examine the Indian biodiversity laws and attempts to unearth the actual picture of benefits sharing among the stakeholders in India with the help of the writings in the ancient Indian texts and philosophy.

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Keywords: Biodiversity, Environment, CBD, ABS, Ancient India.

Introduction

Biodiversity refers to the biological diversity that exists on Earth. The ecosystem of this planet has evolved over a period of 3,000 million years.[3] In order to comprehend the concept of biodiversity in its totality and understand its various aspects, scientists have used the concepts of ecosystem diversity, species diversity, and genetic diversity.[4] India is a country that is rich in terms of biological diversity as well as a traditional and contemporary knowledge system. Therefore, it is important that it must protect and conserve its biological diversity. This responsibility has grown even more after India became a party to the United Nations Convention on Biological Diversity[5] at Rio de Janerio in 1992. The Convention reaffirms the sovereign rights of the states over their biological resources. To give effect to this convention, the Indian Parliament passed The Protection of Plant Varieties and Farmers' Rights Act, (PPVFR) 2001 and Biological Diversity Act, 2002. These two statutes contain provisions for the equitable sharing of benefits arising out of genetic resources, which in turn helps in the conservation of biodiversity and in the maintenance of its sustainability. It is seen that even after over 16 years of enactment of these above-mentioned statutes, the situation of the stake-holders remains grim and the Acts have failed to fulfill the desired expectations. The provisions of the Indian laws concerning biodiversity depicts an image akin to a mirage in the desert, which from a distance gives the impression of being an oasis but in reality, is an illusion. In order to analyse the correct picture of the same, a systematic study has been carried out on the concept of Access and Benefit Sharing (ABS), impressed inside the two Acts mentioned above. This analysis was done to discover the truth behind the Access and Benefit Sharing (ABS) mechanism in India and endeavours to discover a possible solution for this question in

3 Jeffrey A. McNeely, Widening Perspectives on Biodiversity 7 (Anatole Krattiger et al. ed. 1994).

4 A.K. Jha, Conserving Biodiversity: Need for Statutory Support, 30(10) EPW. 492, 492 (1995).

5 Convention on Biological Diversity, Jun. 5, 1992, 1760 UNTS 79; 31 ILM 818.

the teachings and philosophies of Ancient Indian texts, which are deemed to be a storehouse of knowledge and wisdom.

Global endeavours and the concept of benefit sharing in biological diversity

The starting point of understanding the existing international framework for Access and Benefit Sharing (ABS) of genetic resources is the Convention on Biological Diversity (CBD). The need to conserve biodiversity rose to the forefront with the formulation of the United Nations Convention on Biological Diversity (UNCBD) at Rio de Janeiro in June 1992. It says that "'Biological diversity' means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are a part; this includes diversity within species, between species and of ecosystems".[6] The CBD is one of the multilateral treaties that opened for signature at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, Brazil (hereafter the Earth Summit or UNCED). Starting from Convention on Biological Diversity (CBD) till Conference Of Parties 13 held in Cancun, Mexico, December 2016 the core issue in the minds of the policymakers is conservation and protection of biodiversity loss at the global, national and regional levels. The CBD has been ratified by almost all the members of United Nations Organization, attributing an almost universal character to the Convention. The treaty entered into force on 29 December 1993 and has three objectives, *viz.* the conservation of biological diversity; the sustainable use of the components of biological diversity; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Access and Benefit Sharing can be understood as the process wherein when bio-resources or people's knowledge are accessed, the user or accessory must compensate the provider community, either in financial terms or acknowledge the source.[7] However, once access is allowed, then the challenges for regulatory mechanisms are to identify and claim a share of benefits and to

6 Convention on Biological Diversity art. 2, Jun. 5, 1992, 1760 UNTS 79; 31 ILM 818.

7 Kanchi Kohli & Shalini Bhutani, The Legal Meaning of Biodiversity, 48(33) EPW. 15, 16 (2013).

ensure just and equitable sharing. Article 16 of the Convention on Biological Diversity states the ways in which the Access and Transfer of Technology should take place.[8] The Nagoya Protocol on Access and Benefit Sharing in Tokyo in 2010 is an agreement that aims at sharing the benefits arising from utilisation in a fair and equitable way, thereby, contributing to the conservation and sustainable use of biodiversity. Genetic resources ranging from plants, animals, and micro-organisms are used for various reasons from research to products, etc. However, at times the traditional knowledge so associated with the genetic resources is obtained from the indigenous and local communities, providing valuable information to researchers.[9]

The Biological Diversity Act, 2002 and Access and Benefit Sharing

The Biological Diversity Act, 2002 came into existence much later than the other existing laws on the environment such as the Indian Forest Act, 1927, Wildlife Protection Act, 1972, Environment Protection Act, 1986, etc. Though all these legislations laid impetus to the conservation of the environment, yet, none of them properly addressed all the dimensions of biodiversity preservation and Access and Benefit Sharing. The objectives of the Act [10] as adopted by the legislators, may be summarized as the Conservation of biological diversity, the sustainable use of its components and fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[11] Apart from these chief objectives, the Act has also given reality to some of the aims of Convention on Biological Diversity, 1992. They are as follows:

To set up National Biodiversity Authority (NBA), State Biodiversity Board (SBB) and Biodiversity Management Committees (BMCs).

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8 Convention on Biological Diversity art. 16, Jun. 5, 1992, 1760 UNTS 79; 31 ILM 818.

9 United Nations Decade on Bio-diversity, The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing, Living in Harmony with Nature (Jul. 31, 2017, 4:32 PM), https://www.cbd.int/undb/media/factsheets/undb-factsheet-nagoya-en.pdf.

10 Punam Singh Chandel, Critical Review of "The Biological Diversity Act, 2002", 2 (Jul. 31, 2017, 5:48 PM), https://www.academia.edu/242307/Critical_Review_of_Biodiversity_Act_2002.

11 Biological Diversity Act, 2002, GOI. Act No. 18, (2003).

To respect and protect knowledge of local communities traditional knowledge related to biodiversity.

To conserve and develop areas of importance from the standpoint of biological diversity by declaring them biological diversity heritage sites.

Lacunae in the Act:

The Biological Diversity Act, 2002 was enacted in India in order to develop the proper utilization of genetic resources and to protect the rights of the Traditional Knowledge Holders by the mechanism of Access Benefit Sharing (ABS) in the country. However, there have been several challenges that emerged during the process. Firstly, there is no clear distinction made between 'genetic resources' and 'biological resources' in the legislation. Hence, the collection, sale, or purchase of a single biological specimen constitutes access to genetic resources.[12] This seems contrary to the entire motive of the Act, thereby, paving the way for easy exploitation of the natural resources. Secondly, the said law does not specifically address the question of ownership over genetic resources since tracking genetic resources and ensuring legal compliance by the users of genetic resources is difficult. Furthermore, these genetic resources are accessed by different bio-prospectors (collectors, researchers, and others) and various other international companies for diverse purposes. The provisions regarding Access and Benefit Sharing does not differentiate between these uses. Last, but not the least, in India, only a few bio-prospecting proposals have been submitted and approved. Details of these negotiations and procedures involved are not yet available and hence, the effectiveness of the Act in practice is yet to be realized.[13]This poses further challenges for the implementation of the given biodiversity law. The formulation of the Act took nearly a decade after the ratification of the Convention on Biological Diversity. Thus, it clearly demonstrates that the government

12 Krishna Prasad Oli et al., Access and Benefit Sharing from Genetic Resources, For Mountains and People by International Centre for Integrated Mountain Development, 3 (2008)

file:///C:/Users/user/Downloads/Access%20and%20Benefit%20Sharing%20from%20Genetic%20Resources.PDF.

13 Id.

officials, NGO's and academicians formulated the provisions after thorough research and consideration. However, certain lacunae are still apparent in the Act. It centralizes all the property rights either in the hands of the state through sovereign appropriation, or, in the hands of private inventors through the monopoly of intellectual property rights. It does not, however, provide a framework for the rights of all other holders of biological resources and related information. The consequence is that resources and knowledge are not allocated through intellectual property rights regime and thus, are freely available. Another major flaw is that this Act does not give sufficient consideration to conservation; rather it lays more emphasis on preventing profit-sharing from the commercial use of the biological resources. The provisions of the Act with regard to the regulations of the Access and Benefit Sharing mechanism has resulted in gross misuse by the authorities like that of the National Biodiversity Boards, State Biodiversity Boards, etc. These authorities had been set up to look over the benefit-sharing process between the parties. They are supposed to perform like unbiased umpires and facilitate the process of benefits sharing. Unfortunately, it is seen that these very authorities undermine the rights of the stakeholders and the Indigenous Traditional Knowledge holders.

The question that arises now is whether it is a matter of rights or a matter of rewards for the Traditional knowledge holders i.e. the actual beneficiaries. In answer to that, the Act is silent and does not have adequate provisions to check this arbitrary nature of the authorities. Another apparent lacuna of the Act is the one regarding the role of the local communities in the Access and Benefits Sharing mechanism. An analysis of the provisions reveals that locally concerned communities do not have any real power in the decision-making process. Regulation of access is done by the National Biodiversity Authority and the State Biodiversity Authority; not the local communities. The National Biodiversity Authority may consult the communities to work out benefit sharing mechanisms after the decision to allow access is made.[14] The communities have no say in deciding whether, or, not the access should be allowed in the first place. They are not well informed as to their rights and have very

14 Biological Diversity Rules, GOI, S.20 (2004).

less knowledge of the system of Intellectual Property Rights or commercial use of the traditional knowledge, and this highly centralized approach is not one of great benefit. It is important to note that an ordinary citizen cannot directly approach the court. An aggrieved benefit-claimer is required to give prior notice of his/her intention to make a complaint. Otherwise, he has to file a complaint with the National Biodiversity Authority, which will then take necessary action. The absence of *locus standi* to all citizens is of grave concern. Since local communities are not well informed about the manner in which bio-resources from their villages are being used, they remain mute spectators to the outside influence over resource extraction to external parties interested in resource extraction. The ground reality is very sad and any attempt in search of mitigating their grievances through government institutions would only delay the chances to get any remedy.[15] The legislation truly depicts the characteristics of a mirage whereby the oasis of benefit sharing is only an illusion.

Tracing Access and Benefit Sharing in the tribal societies and ancient Indian texts

In the process of unearthing possible answers in the belief and practices of Indian tribal societies and ancient Indian religious texts, an effective example can be that of the tribal society of the Indian State of Meghalaya, wherein, a successful model of biodiversity conservation along with fair and equitable distribution of benefits arising out of genetic resources among the traditional knowledge holders is found from time immemorial. There is a range of Forest Reserves considered very sacred among the native people of the region *viz.* sacred groves. They represent a long-standing tradition of environmental conservation based on indigenous knowledge by the tribal communities of Meghalaya. These forests are segments of the landscape containing vegetation, other forms of life and geographical features, delimited and protected by human society under the belief that to keep them in a relatively undisturbed state, is an expression of an important relationship of humans with the divine or with

15 Udisha Ghosh & Chandralekha Akkiraju, Biodiversity Act, 2002: An Analysis, Academike (Jul. 30, 2017, 3:54 PM), https://www.lawctopus.com/academike/biodiversity-act-2002-analysis/#_ednref10.

nature.[16] These virgin forests are biodiversity-rich treasure houses, which provide refuge for a large number of endemic, endangered and rare species. Protected areas are considered to be the cornerstones of biodiversity conservation and the safest strongholds for wildlife.[17] The concept of sacred groove conservation in the state of Meghalaya is strongly believed to be an indigenous knowledge that is conceived, developed and perpetuated by the indigenous people of the state, *viz*. Khasis, Garos, and Jaintias.[18] Over the years, such forests have been attributed with several values like natural museums of giant trees, a treasure house of threatened species, dispensary of medicinal plants, a regulator of water sheds, a recreation centre for urbanites, veritable garden for botanists, gene bank of species. They are considered as a paradise for nature lovers.[19]Sacred Forests represent a long tradition of environmental conservation based on ecological principles practised by the indigenous people of the Khasi, Garo and Jaintia tribes.[20] The local communities involved in the conservation of these sacred forests are also benefitted in the entire process. These forests are storehouses of medicinal plants which comes handy for the villagers. These tribal societies with their age-old traditional customs have proved that the concept of conservation of biodiversity and equitable sharing of benefits arising out of genetic resources is not a new concept rather, it was practiced with more dedication and sincerity in the tribal societies of India. Coming to the point of recorded texts on the conservation of biodiversity and sharing its benefits for the common of the society is found in many religious and administrative books of ancient India.

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16 Shodhganga, Introduction, Chapter –1 Problem and Statement of the Problem, 3

http://shodhganga.inflibnet.ac.in/bitstream/10603/102567/8/08_chapter%2001.pdf.

17 Aaron G. Bruner et al., Effectiveness of Parks in Protecting Tropical Biodiversity, 291 Sci. 125, 126 (2001).

18 S Jeeva et al., Sacred Forests: Traditional Ecological Heritage in Meghalaya, 5(4) IJTK. 563, 563 (2006).

19 Madhav Gadgil & V.D. Vartak, Sacred Groves of India: A plea for continued conservation, 72(2) J Bom Nat His Soc. 314, 316 (1974).

20 S Jeeva & R Anusuya, Ancient ecological heritage of Meghalaya, 3 Mag. 20, 20 (2005).

"Ancient India was a knowledge society that contributed a great deal to civilization. We need to recover the status and become a knowledge power. Spirituality must be integrated with education. We should ignite our dormant inner energy and let it guide our lives. The radiance of such minds embarked on constructive endeavour will bring peace, prosperity, and bliss to the nation."[21] Sustainability, which the world community is giving much importance today, was, in fact, ingrained in the thought process of early Indians as evident from the teachings of the Vedas. In the ancient Indian text of Atharva Veda, it has been defined in the form of a hymn and reads as thus, "Whatever I dig out from you, O Earth! May that have quick regeneration again; may we not damage thy vital habitat and heart" [22] In the Vishnu Purana, there is a reference to Vanas (forests) existing across the length and breadth of the country.[23] In fact, some of the oldest Upanishads are included in the Aranyaka texts, which are meant for the study of those who are engaged in the vow of forest life, the Vanaprastha.[24] Again, in the Mauryan period, there existed an independent forest department with a system of forest offences and penalties.[25] The description of the ancient Indian law or environmental protection is found in Kautilya's Arthshastra.[26] He categorized forests as Pashuvana (forest for cattle and other such animals), Mrigavana (deer forest), Dravyavana (forest for timber-yielding trees and other economically important plants), Hastivana (forest for elephants), Pakshivana (forest reserved for birds), and Vyalavana (forest for tigers and other wild animals).[27] Kautilya elaborates that Dravyavana and Hastivana are sources of natural wealth. He also instructs the king to establish the following forests on the uncultivated land. They are categorised as Vivita (Grassland

21 P. Jegadish Gandhi, Dr. Abdul Kalam's FUTURISTIC INDIA 39 (2006).

22 BM Kumar, Forestry in Ancient India: Some Literary Evidences on Productive and Protective Aspects, 12 (4) Asian Agri-Hist. 299, 300 (2008).

23 Sanjay Upadhyay & Videh, Handbook on Environmental Law 78 (2002).

24 Pankaj Singh & D.S. Chauhan, Tribals and State War, Tribal Rights and Forest Conservation Laws, (Aug. 1, 2017, 9:01 AM) https://works.bepress.com/pankaj_singh/3/.

25 Mahesh Rangarajan, India's Wildlife History 7 (2001).

26 Shyam Divan & Armin Rosencranz, Environmental Law and Policy in India :Cases, Material and Statues 27 (1991).

27 Id.

for cattle), Brahmaranya (Forest where the Brahmins can continue their studies of Vedas and other scriptures), Somaranya (Forest fit for carrying out religious sacrificed rites) and Tapovana (Forest for construction of hermitages of the ascetics). He further recommends that the "Superintendent Of Forest Produce" appointed by the State for each Forest Zone be responsible for maintaining the health of the forest for sustainable use of these forest resources. Traces of Benefit Sharing in Kautilya's Arthashastra can be understood when he advocates for the regulations on the forest producing products to satisfy economic needs.[28] India has a long history of conservation, at both official and people's levels. Although in a different connotation, the evidence of the presence of the concept of the fair and equitable sharing of benefits arising out of genetic resources even at ancient times in India, cannot be outrightly denied.

The Protection of Plant Varieties and Farmers' Rights Act (PPV-FR), 2001 and Access and Benefit Sharing

Another aspect of biodiversity conservation is the conservation of Plant Genetic Resources (PGRs). They are generally, accepted as the pillars of a good and nutritionally secure society and is considered as an invaluable asset of any nation. It constitutes a unique heritage and their conservation and proper utilization is of immediate concern. Several Conventions tried to address the pressing problem of degradation of Plant Genetic Resources internationally. Growing concerns about the vulnerability of the agricultural production, food security, and environmental stability have moved the conservation and sustainable use of plant genetic resources to the top of the development agenda of several nations They have many utilities like supplying food, medicinal utilities, raw materials for industries and factories, etc. Plant genetic resources are regarded as our invaluable assets to meet the growing needs to increase crop production and productivity.[29] Many countries of the world have recognised this facet of biodiversity conservation and have come up with their own sets of domestic legislation. In India, significant

28 Renu Tanvar, Environment Conservation in Ancient India, 21(9) IOSR-JHSS. 1, 2 (2016).

29 K.S. Varaprasad & N. Sivaraj, Plant genetic resources conservation and use in light of recent policy Developments, 1(4) EJPB. 1276, 1279 (2010).

developments have taken place with respect to the rights of plant breeders, farmers, and local communities. The Protection of Plant Varieties and Farmers' Rights Act (PPVFR), 2001 is a glaring example. The aim of this statute was to help the local communities gain strong control over natural resources, effectively understand their responsibilities as stewards of biodiversity conservation and realize their fair and equitable share of benefit.[30]

The four major objectives of the Act may be discussed under the following heads:

Firstly, to recognise and protect the rights of the farmers for their contributions made in conserving, improving and making plant genetic resources available for the development of new varieties. Secondly, to protect a plant breeder's right to stimulate investment in research and development, both in the public and private sector, for the development of new plant varieties. Thirdly, it aims to facilitate the growth of the seed industry in the country to ensure the availability of high-quality seed and planting material to the farmers. Fourthly, it endeavours to make provisions in compliance with Article 27.3(b)[31] of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).

As far as the issue of sharing of benefits arising from protected varieties of plants by the plant breeders is concerned, it is subject to voluntary declaration by a breeder, or, in case of an establishment of the fact that a given new variety was developed using indigenously derived genetic resources from public institutions, NGOs, private breeders, village or tribal communities, a part of the commercial proceeds from such variety shall be required to be paid as the benefit share.[32] It is required that such benefit share may have to be deposited in the National Gene Fund (NGF). The Act also recognises the rights of the communities involved in agriculture. There

30 Sumit Chakravarty et al., Farmer's Rights in Conserving Plant Biodiversity with special reference to North-East India, 13 JIPR. 225, 227 (2008).

31 The Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27.3(b), Jan. 1, 1995, 1869 UNTS 299; 33 ILM 1197 (1994).

32 Jayne Kuriakose & Mayank Mishraa, Rhetoric of Plant Variety Protection in India, The Practical Lawyer, 3 (2003) http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=642.

is recognition of the role of traditional and rural communities in conserving and preserving genetic resources of landraces and wild relatives of crops and also the eligibility for compensation for the contribution made by village or local communities in the evolution of a variety. Such compensation is to be determined by the PVP authority and deposited in the NGF.

On perusal of the above provisions of the Act, along with its objectives, a question naturally arises in the mind of a layman as to whether these provisions are sufficient and are they really catering to the needs of the farmers and the society as a whole? Does it really facilitate the conservation of the plant biodiversity?

A systematic investigative research reveals that the Act only allows for registration of new crop varieties but does not protect absolute 'commercial interests' of the breeder or institution that develops a new variety because it gives space for farmer's rights to grow, sell, resell and save seed of registered varieties. The Act is, therefore, in the real sense, a Farmer's Rights Act not a Plant Variety Protection Act. These questions give birth to several other questions as to eventually who is the actual beneficiary of the PVP Act and how will it affect the various stakeholders, *viz.* the traditional farming communities, the private sector plant breeder, and private seed company or the public sector. Is the benefit to stake-holder ultimately being beneficial in the long term and what will be its impact on the conservation of biodiversity? Thus, it can be understood that while the philosophy behind this concept is statutory, the creation of a system for equitable sharing of benefit among all stakeholders down to the grass root level in a manner to stimulate the process of conservation is indeed difficult to put in place.[33] The legislators in India enacted this legislation with an aim to protect the plant varieties plus ensuring the rights of the farmers. It also aimed to achieve a perfect benefit-sharing mechanism in the area of plant genetic resources, but the results even after 16 years of its incorporation

33 R. Kalpana Sastry, Protection of Plant Varieties and Farmer's Right Act- A Critical Analysis, Project Assignment, NALSAR Proximate Education, Hyderabad, 23 (2004)

http://www.nalsarpro.org/PL/Projects/ModelProject1.pdf.

are far beyond satisfactory.

Plant Genetic Resources, Access and Benefit Sharing and Ancient India

A glance at the history of Indian agriculture reveals certain interesting facts, that the ancient Indian scholars, too, had pondered over this benefit sharing mechanism, albeit in their own version, to achieve conservation of plant biodiversity, its sustainability and even sharing of benefits arising out of such plant genetic resources. There are a few instances which prove that some areas were protected for their plant biodiversity and agriculture, as early as the third century BC in the times of Emperor Ashoka.[34] During his reign, the planting of medicinal herbs, plants, etc. besides shade trees along the roads and fruit plants on the wastelands was mandatory- analogous to the social and agroforestry programmes of today in some ways.[35] A very interesting aspect of conservation of plant biodiversity can be found in *Visnu- Samhita*[36], wherein the scripture considers injuring or destroying plants and plants parts, damaging the crops and stealing of plant parts or vegetable products as offences, and further prescribes punishments for the offenders. The fear of punishment acts as an effective deterrent and prevents the greedy people from causing harm to plants, plant-parts and stealing the same. There are also numerous examples of sacred land/ waterscapes especially among the hunter-gatherer, agricultural, and pastoral communities spread throughout the country. One recent estimate suggests that up to 10 to 30 percent of India may in the past have been covered by sacred spaces[37] patches of forest and

34 Madhav Gadgil & Ramchandra Guha, This Fissured Land: An Ecological History of India 88-89 (2008).

35 Kumar, supra, 20.

36 Priyadarsan Sensarma, Conservation of biodiversity: Traditional approach, 3(1) IJTK. 5, 7 (2004).

37 Y. Gokhale et al.Sacred Woods, Grasslands and Waterbodies as Self-organised Systems of Conservation in India, Regional Workshop on the Role of Sacred Grooves in Conservation and Management of Biological Diversity, 34 (1997),

https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwjX_rPE_fzVAhUKwI8KHWEQDGgQFggtMAI&url=https%3A%2F%2Fwww.researchgate.net%2Fprofile%2FYogesh_Gokhale%2Fpublication%2F259151142_Sacred_woods_grasslands_

other ecosystems kept undisturbed by strict social sanctions. Even outside such spaces, hunting and fishing communities followed strict rules, such as, not killing the pregnant females and young ones/sub-adults, not hunting or fishing in certain seasons, and many others.[38] The earth has always been described in our ancient scriptures as the Mother who nourishes and sustains the human race and all the living beings. The Vedas clearly mentions that the earth is our mother and we are all her children. Just as a mother brings up her children lovingly, so does the mother earth and it is our duty to revere all that were received from her and return it back through love and care.[39] But until human cultural and historical relationship with the biodiversity is not considered significant, the importance of these bio-resources cannot be estimated. For example, Lodhas of Midnapore, West Bengal, utilize 409 species of plants for 1059 different uses[40], folks of Manipur use 523 plant-species for 800 purposes[41]. These examples testify that cultural inputs enhance the practical value of the bio-resources. Thus, it may be observed that any investigation of biodiversity from the point of view of a taxonomist / conservationist would remain incomplete if the traditional, cultural, and most importantly, the historical aspect of the elements of biodiversity is not taken into account.[42] This is not to say that traditional management was a flawless system, and if continued as such would necessarily have led to better management of resources in the country. This only implies that there already existed a highly decentralised system of management, with elaborate sets of rules and regulations, which could have been built upon and modified to meet modern challenges. Unfortunately, the

and_water_bodies_as_self-organized_systems_of_conservation%2Flinks%-2F5543193e0cf234bdb21a310e%2FSacred-woods-grasslands-and-water-bodies-as-self-organized-systems-of-conservation&usg=AFQjCNElmROarEmRf3l-Hib55BZIl1OzTgA.

38 Gadgil, supra, 32.

39 Lalit Kumar Singh, Bio-diversity Conservation-Concept and Need, 4(34) SRJIS. 30, 30 (2017).

40 D.C. Ethnobotany of Midnapore District, West Bengal (India), Ph. D. Thesis, University of Calcutta, (1985).

41 S.C. Sinha, Ethnobotanical Study of Manipur, Ph. D. Thesis, Manipur University, (1986).

42 Priyadarsan Sensarma, Biodiversity in Gautama-Sa□hitā, 86 Annals of BORI. 167, 172 (2005).

reverse has happened in the last century or so.[43]

Discussion and Conclusion

The concept of Access and Benefit Sharing has been borrowed from the Convention on Biological Diversity (CBD) by the Indian lawmakers. The intention to incorporate this noble idea in the domestic laws of the country was to achieve a fair and equitable distribution of benefits arising out of genetic resources. Although it appears that these principles involving biodiversity are new to the Indian legal domain, but a comprehensive research indicates the presence of similar or rather much-improved ideas regarding biodiversity conservation in the ancient Indian texts and philosophy. The policy-makers, in their haste, joined the mad race of the ratification of the principles of the ABS mechanism in their domestic laws and in that process completely neglected to research if any similar ideas were already in existence in the cultural and traditional teachings of this country, which has always been rich in traditional knowledge. The total reliance on the idea developed in the international arena has made the policy makers blind to the fact that rather more concrete ideas can be borrowed from the rich ancient Indian philosophy on the conservation of biodiversity, its fair and equitable use of its genetic resources and achieve sustainable development. As a matter of fact, even the world community may be benefitted from the noble Indian philosophy on biodiversity conservation. From the above discussion, it is evident that the existing laws on sharing of benefits arising out of genetic resources are inadequate and appears as an illusion like a mirage. Therefore, instead of rummaging for solutions in the systems of other nations for problems that vary from country to country, the policy makers of India should pay more heed to and explore the time-tested treasures of the philosophy and teachings of Ancient India.

43 Neema Pathak & Ashish Kothari, Sharing Benefits of Wildlife Conservation with Local Communities: Legal Implications, 33(40) EPW. 2603, 2605 (1998).

DEMOLISHING DISABILITIES THROUGH CONSTITUTIONAL EMPOWERMENT: A CATHARTIC EXPERIENCE

A Review of the Supreme Court of India's decision in:

Jeeja Ghosh and Another v. Union of India and Others, (2016) 7 SCC 761

Subornadeep Bhattacharjee[1]

"…"We, the people." It's a very eloquent beginning. But when the document was completed on the seventeenth of September in 1787, I was not included in that "We, the people." I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake. But through the process of amendment, interpretation, and court decision, I have finally been included in "We, the people.""

-United States Democrat Representative Barbara C. Jordan[2]

INTRODUCTION

Courtesy of the endowment of the framers of our very own Constitution, the Preamble begins with the same set of resounding words as in the case of the Constitution of the United States- 'We, the people'. However, the relevance of these oft-quoted words seems to traverse through a common perception of gospel truth, without appreciatingthe fact that the custodians for ensuring the sanctity of these words are the 'people'themselves. The three pillars of a democracy exist only to supplement this process. The above excerpt from Representative Barbara Jordan's celebrated speech to the House Judiciary Committee of the US Congress in 1974, reinforces this very notion. And none would cherish the fruits of this notion, as much as the petitioner who forms the subject matter for the purposes of this case comment- Ms. Jeeja Ghosh. The recent Supreme Court case of *Jeeja Ghosh v. Union of India and Others*[3] ushers in a

1 Author introduction: The author is a V Year B.A., LL.B (Hons.) student at the National Law University, Assam (NLUA), Guwahati and can be reached at subornа24@nluassam.ac.in or nlujaa.sbhattacharjee@gmail.com

2 Jordan, Barbara Charline ,"Statement on the Articles of Impeachment", 25th July 1974. Last Accessed from: http://www.americanrhetoric.com/speeches/barbarajordanjudiciarystatement.htm on July 23, 2017 at 09:47 A.M.

3 (2016) 7 SCC 761

paradigm shift in judicial bent of mind, by viewing the needs of the disabled/differently-abled persons[4] in the country, from a human rights perspective as opposed to the traditional approach based on sympathy and medical/welfare model.

A. Summary of Facts

Before we proceed ahead, the facts of the case deserve an audience. Ms. Jeeja Ghosh is Petitioner 1 in this case, aided by the support of the NGO ADAPT[5], Petitioner 2. Ms. Jeeja Ghosh is a prominent Indian disability rights activist,[6] suffering from cerebral palsy[7]. As

4 The author shall hereinafter, in pursuance of a person-first language, consciously opt to the usage of the term 'people with disabilities' in the rest of this comment, as the term "disabled" is considered either outdated or offensive, which has been used in the judgment of the Court.

5 ADAPT is an acronym for the NGO 'Able Disable All People Together'.

6 Ms. Jeeja Ghosh is inter alia, a Board member of the National Trust, an organization of the Government of India, set up under the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

She had been felicitated by the West Bengal Commission for Women on the occasion of International Women's Day, 2004 while also being a recipient of the Shri N.D. Divan Memorial Award for Outstanding Professional Services in Rehabilitation of Persons with Disabilities, by the National Society for Equal Opportunities of the Handicapped in 2007. She has also been a recipient of the "Role Model Award" from the Office of the Disability Commissioner, Government of West Bengal, for the year 2009, while being elected a Member of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities between the period from 14th August, 2008 to 19th July 2011.

7 Cerebral Palsy (pronounced "seh-ree-brel pawl-zee") is a blanket term commonly referred to as "CP" and described by loss or impairment of motor function, cerebral palsy is actually caused by brain damage. Last accessed from http://www.cerebralpalsy.org/about-cerebral-palsy/definition on 27th July 2017 at 11:47 P.M.

However, the clause (zc) of Section 2 read with the Schedule appended to the Rights of Persons with Disabilities Act, 2016 goes onto enumerate 21 recognized 'specified' disabilities. The Schedule thus, under the Heading 'Physical Disability' enumerating Locomoter disabilities goes onto define cerebral palsy under clause (b) as:

'(b) "cerebral palsy" means a Group of non-progressive neurological condition affecting body movements and muscle coordination, caused by damage to one or more specific areas of the brain, usually occurring before, during or shortly after birth; '

the facts stood, Ms. Ghosh was cordially invited to an International Conference being organized by ADAPT in Goa. It was scheduled from the 19th-23rd February 2012. Furthermore, she was also one of the fifteen international experts who were to review an Indo-German project, which was to be showcased at the said Conference.

Accordingly, ADAPT booked flight tickets for Ms. Ghosh and booked her on the Spicejet Airlines Flight 'SG 803', scheduled to depart from Kolkata to Goa on the morning of the 19th March 2012, right in time for Ms. Ghosh to participate in the Conference proceedings on the same afternoon. Upon embarkation on the flight, said members of the cabin crew requested to examine her boarding pass. Ms. Ghosh politely obliged. But to her utter horror and bewilderment thereafter, the cabin crew proceeded to mercilessly de-plane her from the aircraft without any reasonable explanation, despite her tearful protestations. It was post her arrival at the airport that she was explained that she was disembarked from the scheduled flight at the behest of the Captain, on the grounds of her 'disability'.

Accordingly, she could not fulfill her prior commitments at the Conference in Goa, depriving both the audience and the organizers her much respected views and insights on disability rights. So shocking and agonizing an experience it was for Ms. Ghosh that even after four years had elapsed since the horrifying incident, she continued to be terrified. Accordingly, she moved the Supreme Court under Article 32 of the Constitution of India to put a system in place to ensure that such people with disabilities did not suffer such indignation (?), as it infringed, at the core, their [differently–abled persons] fundamental rights under Articles 14 and 21 of the Constitution of India.

B. The Supreme Court's Verdict

The case was heard and decided by a Division Bench comprising Dr. A.K. Sikri and R.K. Agarwal, JJ. Dr. A.K. Sikri, J. delivered the judgment of the Court, wherein the Court inspected the Civil Aviation Requirements, 2008[8] with regard to "Carriage by Air of Persons

Thus, after the President granted the assent to the legislation on 27th December 2016, the Act came into effect on 30th December 2016.

8 Hereinafter referred to as CAR, 2008.

with Disability and/or Persons with Reduced Mobility"[9] issued by the Directorate General of Civil Aviation[10], as authorized by Rule 133-A of the Aircraft Rules, 1937.[11]

After the Court examined the relevant provisions of the Aircraft Rules and CAR, 2008, it arrived at the conclusion, that Ms. Ghosh was treated in an apathetic and shoddy manner, against the prevailing provisions of the Rules, 1937 and the CAR, 2008. Accordingly, while the Court granted Ms. Ghosh damages to the tune of INR 10,00,000 in light of her suffering and mental trauma while stating that the CAR instructions, are laid down while keeping in view the spirit of 'human dignity' enshrined under Article 21[12] of the Constitution of India and any departure from such instructions by airline personnel would be derogatory to the solemn constitutional guarantee of 'human dignity'.

C. The Road Ahead

As I proceed further, the comment shall be divided into two distinct parts: Part A, which shall deal with the mammoth shift in considering the rights of persons with disabilities, from the constitutional prism of a 'human rights approach' which augurs well for shaping the jurisprudence and discourse on disability rights, in India. In Part B, I shall venture on to the illuminating task of illustrating how the Supreme Court of India, continues to be atodds when it comes to the application of a harmonious interpretation of the principles

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9 The CAR, 2008 as regards Carriage by Air of Persons with Disability and/or Persons with Reduced Mobility enumerated under Series 'M', Part I, Issue 2 (as it then was when the incident transpired) was issued on the 1st May, 2008. The new Issue 3, herein referred to as CAR, 2014 has superseded the CAR, 2008 and stands in operation since 28th February 2014. The CAR, 2014 was formulated based on the recommendations of the "Ashok Kumar Committee", under the Chairmanship of G. Ashok Kumar, Joint Secretary, the Committee having been appointed by the Ministry of Civil Aviation to overcome the shortcomings of CAR, 2008.

10 Hereinafter referred to as DGCA.

11 The Aircraft Rules, 1937 came into force on 23rd March, 1937 and was formulated in exercise of the powers conferred by sections 5 and 7 and sub-section (2) of section 8 of the Aircraft Act, 1934 and section 4 of the Indian Telegraph Act, 1885.

12 Article 21 – No person shall be deprived of his life or personal liberty except according to procedure established by law.

of public international law with the municipal law of India.While the CAR, 2008 and CAR, 2014 was discussed at length through the course of the judgment; the same has been excluded for the sake of brevity.

PART A

Though the Parliament has passed the Rights of Persons with Disabilities Act, 2016[13]and has come into force on 30th December 2016, superseding the former the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995[14], the dissection of this particular case shall be carried out by placing complete reliance on the 1995 Act, as it was then in operation while the 2016 Act was passed post this verdict.

Dr. Sikri, J. very eloquently commences with the judgment by quoting Joseph P. Shapiro, from his book *No Pity*, in the first paragraph recording: *Non-disabled Americans do not understand disabled ones*.

While the concerned airlines- Spicejet Ltd. Postured their arguments around the fact that Ms. Ghosh had not complied with Article 4.1 of CAR 2008,[15] wherein she failed to inform the airlines of her disability. But the Court found favor with Ms. Ghosh's learned counsel, who argued that the concerned Article 4.1 was divided into two parts- first, it applies to persons with disabilities and second, to persons with disabilities who required aids/assistive devices. Ms. Ghosh fell into the first category and thus had no obligation to inform the airlines of any further requirements. Dr. Sikri, J. then went onto observe that while the in-flight captain had every obligation to ensure the safety of all passengers, there was no credible evidence to provide an iota of suspicion that Ms. Ghosh's 'so-called'

13 Hereinafter, the 2016 Act.

14 Hereinafter, the 1995 Act.

15 4.1. No airline shall refuse to carry persons with disability or persons with reduced mobility and their assistive aids/devices, escorts and guide dogs, including their presence in the cabin, provided such persons or their representatives, at the time of booking and/or check-in for travel, inform the airlines of their requirement. The airlines shall incorporate appropriate provisions in the online form of booking tickets so that all the required facilitiesare made available to the passengers with disabilities at the time of check-in.

disability could be a threat to the scheduled flight plan.[16] No doctor was consulted by the cabin crew, in making their assessment before deciding to de-plane the petitioner. This clearly amounted to a violation of Rule 133-A of the 1937 Rules as well as the CAR, 2008 guidelines.[17]

The judgment very rightly recorded that the rights of the persons with disabilities was based on the sound principle of human dignity, which is the core value of human right and is treated as a significant facet of life and liberty.[18] Article 21 is to be given a purposeful interpretation so as to subsume the facet of human dignity, the CAR 2008 guidelines were formulated to secure this core requirement of humane existence, which extended to persons with disabilities. The Court digressed from the preferred outlook of rendering welfare to such persons, with a 'charitable outlook' who deserved pity and care. Rather, the Court confidently fashioned its judgment to declare that devoid of (dis)abilities of such persons, they had a firm entitlement to the right of dignity, as envisaged under Article 21 of the Constitution of India. Dr. Sikri, J. very sensitively modified Shapiro's quote to state that the '*non-disabled do not understand the disabled ones*'[19] and it was this 'charitable outlook' in the Court's opinion that was the 'worst form of discrimination'[20] which persons with disabilities faced, and hence there was a requirement for the narrative to be altered. Thus, viewing their requirements from the constitutional prism of dignity and human rights, served the best opportunity in securing their fundamental rights, on concrete terms.

PART B

However, this judgment, also brought to the forefront a reality that has plagued the Supreme Court's adjudication for a number of years now- the application of public international law principles to the municipal laws of India. While, the discussion under Part A celebrates the Court's ameliorating approach, Part B serves as

16 Paragraph 34 of the judgment, Supra note 3.
17 Id at Paragraph 36.
18 Id at Paragraph 37.
19 Id at Paragraph 35.
20 Id at Paragraph 43.

a scathing criticism. Such criticism stems from paragraph 13 of judgment quoted below:

"**13.** The Vienna Convention on the Law of Treaties, 1963 requires India's internal legislation to comply with international commitments. Article 27 states that a "State Party…may not invoke the provisions of its internal law as justification for its failure to perform a treaty"."

The glaring errors in this paragraph cannot be missed. Firstly, the Court erred in quoting the Vienna Convention of Law of Treaties, as it was signed in 1969 as opposed to 1963.[21]Be that as it may, the Court should have quoted Article 26 and not Article 27[22], which mandates that a State party must perform the obligations arising out of a treaty based on good faith arising out of the maxim of *pacta sunt servanda*. (Mis)quoting Article 27 was at loggerheads with the Court's own observation:[23]

"…shows the positive stance of the Government and also reflects that the authorities did not treat the present petition as adversarial and accepted that such causesrequire "social context adjudication"approach."

This error by the Court, recorded in its judgment cannot be sidelined as a mere 'blemish'. It rather illustrates, that it needs to refine its own methodology in applying principles of public international law sagaciously.

CONCLUSION

While this judgment shall go a long way in shaping India's jurisprudence on disability rights, it will aid the Court in interpreting the 2016 Act, as well in the future. However, this judgment must surely have come across as a cathartic endeavor for Ms. Jeeja Ghosh and hopefully, this Court's judgment leads to a much more inclusive "We, the people", as Representative Barbara Jordan had acknowledged.

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21 The confusion could have perhaps arisen because of the Vienna Convention on Consular Relations, which was signed in 1963. But that Convention has no part to play in the current case at hand.

22 Article 27 of the VCLT, 1969 stipulates that a party may not invoke its internal law as justification for its failure to perform a treaty.

23 Id at Paragraph 19.

The Chancellor, Masters & Scholars of the University of Oxford & Ors. V. Rameshwari Photocopy Services & Ors: A Case Note

Dr. Topi Basar

1. Introduction

Right to fair use or fair dealing in the Copyright law is one of the fundamental principle to leverage the conflict of private v. public discourse in Copyright law. The Copyright Act, 1957 (hereafter the Act) confers exclusive right to copy or do anything with the work exclusively to the author. By this it means others have no right to interfere with the author's exclusive right. We would be committing copyright infringement but for the gracious Section 52 of the Act which protects our infringement as 'fair dealing' provided the act is committed with the purpose stipulated within the Section 52. No doubt this section has become the rich field of intellectual or legal discourse recently in the dynamic field of Copyright.

The present case popularly known as the 'DU Photocopy' case is undoubtedly the most landmark copyright judgment of the recent times. The case is significant for many reasons and for evolving new legal intellectual jurisprudence pertaining to fair dealing in the Act.

2. Facts

In year 2012 the Oxford University Press, the Cambridge University Press and the Taylor & Francis Group ("Plaintiff-Publishers") filed suit for permanent injunction against infringement of copyright in their publications by the University of Delhi ("Delhi University" or "Defendant No. 2") and a photocopy shop named Rameshwari Photocopy Service ("Defendant No. 1") operating in the University under a license from it, before the Delhi High Court.[1] The Plaintiff-Publishers alleged that the Defendants had been photocopying substantial excerpts from their publications that were part of the prescribed syllabus and issuing/selling unauthorized compilations of them in the form of course packs or anthologies, thereby infringing their copyright in those publications under Section 51 read with Section 14 of the Copyright Act.

1 http://www.scconline.com visited on 20 August 2017.

The single judge passed an interim injunction restraining the defendant from making or selling course packs and also reproducing the plaintiff's publication or substantial portion thereof by compiling the same either in a book form or in the form of a course pack, till the final disposal of the said application. The Delhi University preferred an appeal before the Division Bench against the interim injunction which was rejected and it was told to file application before the Single judge. Meanwhile, ASEAK (Association of Students for Equitable Access to Knowledge) and SPEAK (Society for Promotion of Equitable Access to Knowledge), a society of scholars and academics got impleaded as the third and fourth defendants.

The case evoked wide support and interest amongst large sections of students, academics and civil society expressing their concern regarding the implications on access to knowledge and education in India. In an online petition started on Change.ORG, over 1,250 academics and authors wrote in solidarity of free access for education.[2]

3. Single Judge Pronouncement

On September 16, 2016, Justice Rajiv Sahai Endlaw scripted a landmark judgment by dismissing the entire suit of the plaintiffs. He concluded that the impugned actions of the Defendants do not amount to copyright infringement under Section 52(1) (i) of the Act, which provides that any reproduction of a copyrighted work by a teacher or pupil in the course of instruction does not constitute copyright infringement.[3]The crux of the judgment are as follows:-

2 https://spicyip.com/resources-links/du-photocopy-case visited on 22 August 2017.

3 The Copyright Act, 1957.S.52. Certain acts not to be infringement of copyright. -(1) The following acts shall not constitute an infringement of copyright, namely: (a) a fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of- (i) private use, including research; (ii) criticism or review, whether of that work or of any other work.....(h) the reproduction of a literary, dramatic, musical or artistic work- (i) by a teacher or a pupil in the course of instruction; or (ii) as part of the questions to be answered in an examination; or (iii) in answers to such questions; (i) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a [sound recordings] if the audience is limited to such staff and students, the parents and guardians of the

i. Section 52 is to be interpreted as a narrow exception but a full-fledged defence in favor of educational institutions and students. The judge opined Sections 14 and 51 on the one hand and Section 52 on the other hand are on the same footing, thereforethe rights of a copyright owner are not to be read narrowly or strictly or so as to reduce the ambit of Section 51.

ii. Section 52 (1) (i) is not restricted to individual teacher and student. This must never have been the intention of the Statute at the first place. Teacher imparts education today as part of the University, therefore when University on behalf of teacher reproduces any copyrighted work by making photocopies, Sec.52 (1) (i) would be applicable.

iii. The word "instruction" in section 52 (1) (i) is not limited to a lecture in the classroom. Therefore, the scope of this provision is not limited to reproduction of a work by a teacher in the course of a lecture but also includes reproduction for the purpose of making and issuing course packs.[4]

iv. The imparting of instruction does not begin and end in the classroom or tutorials only but extends beyond that and thus Section 52(1) (i) covers reproduction by an educational institution during the entire academic session.

v. The judge reasoned if the reproduction of pages from the books by each of the students, whether by way of photocopying, copying by hand or clicking photographs, for his/her private use does not amount to copyright infringement by virtue of Section 52(1) (a), the photocopying of the same work by the University for the benefit of the students due to certain resource constraints cannot be said to be infringement when the intended purpose is the same.

vi. When the making of course pack by Delhi University is not infringement under the said provision then the same work assigned to an independent contractor cannot be termed as infringement.

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students and persons directly connected with the activities of the institution [or the communication to such an audience of a cinematograph film or sound recording].

4 See Para 72 of the Single Bench Judgment.

The plaintiff publishers filed an appeal before the Division Bench and prayed for interim injunction which was refused.[5]Indian Reprographic Rights Organization (IRRO) and two publishers' associations, namely, the Association of Publishers in India (API) and the Federation of Indian Publishers (FIP) filed application for intervention and was allowed by the Court.

4. Highlights of Division Bench Judgment

i. With regards to teaching and use of copyrighted material, the fairness in the use can be determined on the touchstone of 'extent justified by the purpose'. In other words, the utilization of the copyrighted work would be a fair use to the extent justified for purpose of education. It would have no concern with the extent of the material used, both qualitative and quantitative.Section 52(1) (i) does not have an express fair use limitation, only the general principle of fair use can be read into it. It rejected the application of the four factors used for determination of fair use in other jurisdictions, especially the US, to this clause.The fair dealing standard has been prescribed only in clause (a) of Section 52(1) and thus cannot be imported into its other clauses including clause (i).It differed with B.D. Bhandari's case[6] which held that a fair dealing standard was to be read into all clauses of Section 52.

ii. The publishers argued that unauthorized making and distribution of course packs has caused or is likely to cause an adverse impact on the market of their books. Justice Nandrajog observed that a student is not a potential customer of the multiple books used in the course packs and in the absence of course packs he/she would refer to these books in the library. It further noted that instead, the improved education could very well lead to an expansion of the market for these books.

iii. The word 'reproduction', meaning 'making a copy of', includes its plural as well i.e. making more than one copy of the original or photocopying. Similarly, it held that the words 'teacher' and 'stu-

5 Division Bench comprised of Justice Pradeep Nandrajog and Justice Yogesh Khanna of Delhi High Court.

6 Syndicate of the Press of the University of Cambridge… v B.D. Bhandari & Anr (High Court of Delhi, 15 January 2009) judgment delivered by Justice Endlaw.

dent' also include 'teachers' and 'students' and thus making of multiple copies of a work by teachers or students is contemplated under this provision.

iv. The court acknowledged that teaching does not involve simple lecturing by the teacher and taking of notes by the students in the classroom but an interactive discussion based on the pre-reads etc. by the students that is regulated by the teacher. The phrase 'in the course of instruction' included within its ambit preparation and distribution of course packs to students.[7]

v. On the question of photocopy by an external agent court was of the view that it is not practical to expect the teacher nor the pupil to purchase photocopier for reproduction of the material in the classroom. Moreover, the photocopy agent was not making any commercial profit apart from the nominal charge of photocopy.

vi. The course packs were clearly made and distributed by the teachers and not the University, therefore it clearly fell within the ambit of Sec.52 (1) (I). The main job of University was to prescribe syllabi for the courses.

vii. The Court dismissed the appeal holding that Section 52(1) (I) permits unauthorized preparation and distribution of course packs to students, if the works included in the course packs are necessary for achieving the purpose of educational instruction.

The Court remanded the suit to the trial court for factual determination of whether the works included in the course packs in this case were necessary for achieving the purpose of education instruction or not. By now, the suit had garnered wide support and outcry from academic world all over. Surprisingly On March 9, 2017, the plaintiff-publishers surprisingly withdrew the suit perhaps due to growing public support and pressure for the cause. In April 2017,

7 The Court relied on Longman Group Ltd. v. Carrington Technical Institute Board of Governors [(1991) 2 NZLR 574] wherein the words 'in the course of instruction' in Section 21(4) of the New Zealand Copyright Act, 1962 were interpreted to include "anything in the process of instruction with the process commencing at a time earlier than the time of instruction, at least for a teacher, and ending at a time later, at least for a student. So long as the copying forms part of and arises out of the course of instruction it would normally be in the course of instruction".

IRRO filed a Special Leave Petition before the Supreme Court challenging the judgment passed by the Division Bench on December 9, 2016.It was rightly dismissed by the Hon'ble court.

5. Background on 'fair dealing'

Fair dealing is a user's right in copyright law permitting use of, or "dealing" with, a copyright protected work without permission or payment of copyright royalties. The fair dealing exception in the Section 52 allows one to use other people's copyright protected material for the purposes of research, private study, education, satire, parody, criticism, review or news reporting, provided that what you do with the work is 'fair'. If your purpose is criticism, review or news reporting, you must also mention the source and author of the work for it to be fair dealing. Fair dealing requires that you only copy '**as much of a work as is necessary for the purpose' and copying 'must not impact on rights holders' legitimate exploitation of their work'.**The defense of "fair dealing" initially originated and emanated as a doctrine of equity which allows the use of certain copyrightable works, which would otherwise have been prohibited and would have amounted to infringement of copyright. The main idea behind this doctrine is to prevent the stagnation of the growth of creativity for whose progress the law has been designed.This doctrine is one of the most important aspects of Copyright Law which draws a line between a legitimate, bonafide fair uses of a work from a malafide blatant copy of the work. This is the reason why this doctrine was explicitly enshrined in Article 13 of the TRIPS which states- *"Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".*[8]

The Indian and UK copyright laws regarding fair dealing are often characterized as very limited and restrictive as they work in accordance with an exhaustive list of actions which come under the scope of fair dealing. Whereas the US laws of "fair use" provide a wide and open ambit for the fair users of a copyright work. While on one

8 Trade Related Intellectual Property Rights is one of the key multilateral agreement under the WTO.

hand the Indian and UK laws of fair dealing work strictly within the framework of the enlisted actions which constitute fair dealing, the American laws of fair use is open for interpretation and works with the help of only certain guiding factors which help in determining the extent of "fairness" involved in the work.

In English case *Hubbard v Vosper*[9], Lord Denning postulated, "It is impossible to define what is "fair dealing". It must be a question of degree. You must first consider the number and extent of the quotations and extracts.... then you must consider the use made of them....Next, you must consider the proportions...other considerations may come into mind also. But, after all is said and done, it is a matter of impression." In *Chancellor Masters and Scholars of the University of Oxford v. Narendra Publishing House and Ors.*[10]

Also in *Syndicate of the Press* of the *University of Cambridge v. BD Bhandari*[11] allegations of copyright infringement of grammar exercises from the plaintiff's publication by popular publishers MBD. The Delhi High Court held, "the purpose behind the publication of the books, the market and the readers that the two publications targeted were completely different. While the Plaintiff's publication was a textbook and prescribed in the schools/universities to enable students would master the said text, the Defendant's publications were used to study for examinations at a short notice and used by students "who are not the top students in each class/ course or students with high intellect."

4. Reasoning or Analysis

The crux of the Single Judgment is to put it short and simple, any reproduction of copyrighted material whether by a pupil, teacher, University or any agent for the purpose of 'instruction' will not be infringement. The term instruction is broader than lecture which is limited to four walls of the classroom. It would cover any act of reproduction such as making or distribution of course packs for the purpose of educational instruction. It has widened the scope and ambit of Sec.52 (1) (I) by reading pupil and teacher in a plural

9 (1972) 1 All ER 1023 p. 1027.

10 IA 9823/2005, 51/2006 and 647/2006 in CS (OS) 1656/2005.

11 (CS (OS) 1274/2004. Judgment delivered by Justice Rajiv Sahai Endlaw.

sense and extending it to cover University and Photocopy agent who issues the course packs. The reason being teacher is a part of the University and the latter on behalf of the teacher reproduce the course pack through the photocopy agent. The judge seem to have put more emphasis on purpose, effect or end result of the reproduction of material immaterial of who has done it. It is evident Justice Endlaw was heavily inclined towards the students right to access to knowledge and resource constraints in this regard.

The Division bench judgment makes two distinct points, firstly, fair dealing provision is limited to Sec.52 (1) (a) only and not including clause (i) even, secondly, that course packs are made and distributed by the teacher not the University. Thus, the extent of use must be essential to the purpose of instruction i.e. educational. Hence, it was necessary to find whether the extracted portions photocopied from the text were relevant to purpose of instruction being carried out. But who shall determine its relevancy in such cases is the question. The court noted that Sec.52 does not have an express fair use limitation, only the general principle of fair use can be read into it. It rejected the application of the four factors used for determination of fair use in other jurisdictions, especially the US, to this clause. Again, it holds fair dealing provision is limited to Sec.52 (1) (a) only and not including clause (i) within its ambit, leaves some ambiguity. It may be noted that generally it has been accepted that fair dealing is an overriding principle of Sec.52 as a whole. If we take Clause (i) also it expressly mentions that reproduction of any work by pupil or teacher in the course of instruction will not be an infringement. It is not regarded an infringement because it is a fair dealing of someone's copyrighted work. But on other substantive issues both the court have followed same approach and principle.

5. Conclusion

The DU photocopy case is particularly important as it will have an important bearing on the 'right to access and equitable education' in India. The affordability of education mainly the higher education which is beyond the reach of the majority is a serious concern. In such scenario, the judgment of the Delhi High Court is a welcome step. The liberal interpretation of Sec.52 (1) (i) demon-

strates social or public welfare ideology of the Court and a fine balance of private-public dichotomy in copyright. Only rider that the Court imposed is that the extent of use of copyrighted work must be necessary for effectuating the purpose of the course packs i.e. educational instruction. The most striking point by the court is the meaning of 'in the course of instruction' included within its ambit preparation and distribution of course packs to students. This judgment has ensured that educational pursuits are not impeded by monopolistic tendency of copyright laws. Rather, intellectual creativity and knowledge enrichment will boost more intellectual property creation in Copyright. It is indeed a trendsetter judgment in copyright for not only India but for all developing countries.

The Dubious Interaction between Biodiversity and Intellectual Property Rights

Chiradeep Basak[1]

The Derivation of Concern and an eccentric nexus

In 1986, during Uruguay Round of multilateral trade negotiations, when Intellectual Property was introduced as one of the disciplines of trade, we never realized that the wings of IPR regime would grow so fast in a decade. Under the roof of TRIPs, intellectual property became very noticeable. The introduction of intellectual property legislation in the area of plant genetic resources under the pressure of US government as well as requirements of the TRIPs agreement of WTO, not only affected the seeds industry but also the farmers' rights.[2] United States, right after Uruguay Round pressurized for a monopoly protection for several seed corporations. The standpoint of United States on behalf of private seed industries was revolving round the patent protection. According to them, in order to bring innovations in the field of agriculture, IPR regime should be recognized completely.

On the other hand, the environmentalists, civil societies expressed their deep concern about the protection of biodiversity and rights of farmers. These conflicting interests spurred a debate, with profit mindset on one hand while environmental concern on the other. Back then, Nobel peace prizewinner; Norman Borlaug (the man behind green revolution) expressed his concern about the TNCs and private seed companies taking control over the genetic resources of plants.

Even after two decades, we are still struggling to fight this issue, with one crucial question in our reflective mind, whether IPR and Biodiversity conservation can coexist. *Bt* Cotton and *Bt* Brinjal controversies have tabled some serious questions over the environmental governance in India. A lot has been written and discussed on these issues of genetically modified seeds, biotechnological inter-

1 Assistant Professor of Law, National Law University and Judicial Academy, Assam

2 Vandana Shiva, Agriclutural Biodiversity, Intellectual Property Rights and Farmers' Rights 31 EPW 1621 (1996).

ventions and rights of the farmers till now. We have also seen the pro-activeness of Department of Science and Technology as regards Biotechnology Regulatory Authority of India Bill.

We have proponents of IPR, highlighting patent protection of seeds only a way out or rather to say, a prescription to hunger and food insecurity while the opponents stressed the helplessness of farmers and their rights.

It is often stated that IPRs will not stop traditional farmers using native seeds, However, when it is recognized that IPRs are an essential part of a package of agribusiness controlled agriculture in which farmers no longer grow native seeds but seeds supplied b the TNC seed industry.[3]

Somewhere in between these conflicts, Modern ecology has overturned many of the traditional assumptions that govern our relationship with nature. The idea that mankind is the 'source or ground of all value' appears increasingly naive; indeed, it appears as the 'arrogant conceit of those who dwell in the moral equivalent of the Ptolemaic universe'.[4]

IPR has become an integral part of political and economic landscape in which the conservation of the genetic resources takes place.[5] Creating most appropriate balance between conservation of genetic resources and intellectual property protection primarily revolves around two main questions: (a) whether and to what extent, the conservation of biological diversity provides a justification for IPRs, or their limitations, which goes beyond their classic economic justifications; and (b) whether, and to what extent, it is necessary to create *sui generis* right for traditional ecological knowledge.[6]

Article 16(5) of The Convention of Biological Diversity (CBD) is the only provision that brings the nexus between Biodiversity and In-

3 Id. at 1621.

4 David Mence, The cetacean right to life revisited 11(1) Int. J.L.C 17 (2015).

5 Institute for International and European Environmental Policy Report on the inter-relations between Intellectual Property Rights Regimes and the Conservation of Genetic Resources (European Commission Directorate-General, Environment, December 2002).

6 Id. at 5.

tellectual Property Rights.[7] The relevant provision tries to bring a synergy between IPR and CBD but the question lies, to what extent this synergy truly be effective, provided the conflicting interests of economic benefits and preservation of biological resources collides more often. Is there, really a pragmatic solution to these colliding factors? Article 8(j) of CBD brings another crucial role into play, the essence of innovations and practices of indigenous and local communities.[8]

The objective of IP law has always been to protect the innovations of human mind from any kind of misappropriation. Indigenous peoples and local communities have a unique needs and expectations in relation to IP, given their complex social, historical, political and cultural dimensions and vulnerabilities.[9]

The Biodiversity, IPR and ABS milieu- The multi-faceted legal schematic of India

In India, depletion of species diversity has been one of the major concerns of environment up As per latest parliamentary discussion, the honorable Minister of Environment, Forests and Climate Change shared his concern over the declining diversity. According to him, "species diversity is a global phenomenon as habitats of wild animals and plants are increasingly coming under human use. The country's biodiversity faces a variety of threats, from increasing pressure by land use changes in natural habitats, from increas-

7 The Convention of Biological Diversity, Art 16(5)- The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall co-operate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.

8 The Convention of Biological Diversity, Art 8(j)- Each contracting party shall, as far as possible and as appropriate: subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders o such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising form the utilization of such knowledge.

9 World Intellectual Property Organization Booklet on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (2015).

ing pressure by land use changes in natural habitats, demand of natural resources, pollution and proliferation of invasive species. Additionally, climate change also have known effect on coastal and marine ecosystems resulting in rise in sea level, warming of the sea surface temperatures and ocean acidification leading to significant implications on the coastal and marine populations and productivity."[10]

Access to biological resources in India has been a matter of great apprehension, up lately. The decentralized form of biodiversity governance in India addresses some challenges as well as poses certain questions. Until last year, there was a mounting dilemma over the issue of access to benefit sharing mechanism under the biodiversity framework of India. It took NBA, quite a long to come up with concrete ABS guidelines. However, the delay in the formulations of the guidelines, had little bearing upon the effective functioning of biodiversity law and its compliance by all the concerned as these were clearly enunciated in the rules. The onus of intimating, securing and informing approvals from State Biodiversity Boards and the National Biodiversity Authority has always been on the accessors. The legal obligation was evident from the stipulation that the required permissions are to be sought and secured before the access. The power is upon the Central Government that may, in consultation with the NBA by a notification in official gazette, exempt any item from the purview of Act. This is one of the examples that portray some challenges and problems in an effective implementation of biodiversity laws in India. If you shift our focus to access and benefit sharing mechanism of biodiversity legislation in India, we have some hiccups too. There is no doubt that ABS mechanism constitutes the most important aspect of the realization of the objectives of Convention of Biological Diversity, reverberated in our national legislation, National Biological Diversity Act, 2002. It is the prop envisaged for the realization of the primary objectives and concerns for conservation, security and safety of the biological resources and prevention from biopiracy. However, the ABS guidelines have been misconstrued in order to generate revenue for the respective states

10 Statement by Minister of Environment, Forests and Climate Change, Statement regarding Threatened/Endangered Species, Lok Sabha (21/07/2015).

and an instrument for detailing only the obligation of sharing a part of his profits by the bioprospector. The National Biodiversity Rules were already in force since 2004, while Nagoya Protocol on access of benefit sharing came into existence in 2010. Therefore, we need to see whether the ABS guidelines by NBA are in proper alignment with India's commitment towards International Legal Instrument. In addition, a question mounts. Why it took so long to formulate ABS guidelines, even after several directions, requisitions by National Green Tribunal and SBBs? The guidelines, in the form of regulations, are to be framed by NBA, in consultation with the central government. They became operable only after the latter got them placed before the parliament, for a period of one month and notified them in the official gazette. The consultation of NBA with the Central government is a statutory requirement. NBA engaged SBBs and some other stakeholders in the consultation process in order to attain an inclusive exercise for bringing effective machinery as regards ABS.

One of the major concerns before NBA's ABS guidelines came into force was the function of SBBs (*Re* ABS). The law didn't restrict the functions of the SBBs on access and benefit sharing. They were empowered to advice the state government for the purpose of regulation of activities of ABS. Based on which, the state government issued regulations. Closer look into the Biodiversity Act and rules highlights that permitting SBBs "to go ahead with the issuance of the notices to various parties under Section 7 of the Biological Diversity Act, 2002 (BD Act) directing them to submit the information for the purpose of assessment and for passing assessment orders as well as, directing them to deposit the amounts and on failure to do so, entailing prosecution", there exists no bar, with the Framing of Guidelines or with out such a Frame.[11] The two are separate as-

11 The National Biological Diversity Act, 2002, Section 7- No person, who is a citizen of India or a body corporate, association or organization which is registered in India, shall obtain any biological resource for commercial utilization, or bio-survey and bio-utilisation for commercial utilization except after giving prior intimation to the State Biodiversity Board concerned:

Provided that the provisions of this section shall not apply to the local people and communities of the area, including growers and cultivators of biodiversity, and vaids and hakims, who have been practising indigenous medicine.

pects of governance. The function assigned to SBBs under s.7 and flowing from that under various other provisions of the Act, do not get circumscribed by the prescriptions under the ABS Guidelines framed by NBA. The Guidelines framed by the NBA deal with the international dimensions of the Biodiversity Regime, to address the concerns of Piracy and the problems of standing and representation of the stakeholders in effectively claiming benefits equitably, holding the position, in loco parentis and as a Public Trustee. SBB is in the same capacity, with regard to activities, which are entirely and exclusively domestic and internal. Neither the law, nor the guidelines provide scope for conflicts in jurisdiction. Least of all, they do not restrict, in any way the functioning of SBBs. The Guidelines, in a manner of speaking, complement, clarify and strengthen the functioning of SSBs. Entities and activities that are purely domestic in nature and character are deliberately left for regulation, under the Act, by the respective SBBs and State Governments, to address issues that are unique and peculiar to each State and evolve solutions that are appropriate for the situation. Now, when we have ABS guidelines in force, we are yet to comprehend new challenges and solutions it will bring, concerning protection of biodiversity resources.

Another dimension of biodiversity and IP law gyrates around technology transfer. The CBD enunciates clear provisions regarding access to genetic resources by individuals, companies, organizations etc. but in addition, CBD also introduced the mechanism for tech transfer under Article 16.[12]It is quite to differentiate tech transfer from that of ABS. Technology transfer by itself is difficult to separate from ABS in practice, as the provision of access to biodiversity resources (for bio-prospecting) calls for returns in the form of

12 The Convention of Biological Diversity, Article 16(2)-

2. Access to and transfer of technology referred to in paragraph 1 above to developing countries shall be provided and/or facilitated under fair and most favourable terms, including on concessional and preferential terms where mutually agreed, and, where necessary, in accordance with the financial mechanism established by Articles 20 and 21. In the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights.

benefits, where technology transfer is one core option (and a term which is often used interchangeably with the term benefit sharing).[13] The history of international legal framework on environment has consistently emphasized on tech transfer. Right there from Rio Declaration (principle 9), Agenda 21, Johannesburg 2002, Nagoya Protocol 2010, Rio +20, 2011 and even Cancun Agreement under UNFCCC.

The Nagoya Protocol reemphasizes the element of Tech Transfer by providing a stronger basis for a legal certainty and accountability for both users and providers of genetic resources. It also emphasizes on domestic obligations in a mutually agreed terms. In ABS the idea of balance and equity is to be created between the user of the genetic resources and traditional knowledge and its caretaker and provider.[14] In 2004, COP 7 adopted a program of work on tech transfer. The elements of this program were technology assessments, capacity building, creation of enabling environment and information systems but these elements were not properly addressed thereafter. In India, the given legal framework of biodiversity attempts to promote tech transfer. The NBA has a fund, which is raised from the money received in form of loans by central government, royalties and other charges. This fund is channelized to: provide benefits to the claimers, conservation of bio-resources, socio-economic developments of the given areas. In order to bring an effective enforcement, the BMCs were constituted under the Act. Recently, NBA deliberated about some emerging avenues of community development programs and funding mechanisms for promotion and protection of agricultural technology. To attain these goals, tech transfer will play a pivotal role. There are no crystal clear mechanisms for scoping and screening process of bio-resources permitting research and benefit sharing but a recommendation for implementing paced

13 The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization include technology transfer under 46.Types of benefits providing examples in Appendix II (Monetary and Non-Monetary Benefits). These examples point to the inclusion of technology transfer under benefit sharing.

Also See, Fridtjof Nansen Institute Report on Technology Transfer in India: CBD, institutions, actors, typologies and perceptions (2014).

14 Id. at 13.

contracts was put forward and NBA considered the same. There is a dire need to bring a database to extract information on several herbal plants, (may be a subset of TKDL) which in furtherance will ensure and guide the international and national contractors to explore benefit sharing and possibilities of tech transfer. In other words, NBA should link conservation & sustainable use of bio/genetic resources with tech transfer. In addition, the problem of middlemen is something, which NBA needs to eliminate in the whole process of ABS but above all, proper coordination and balance is required among several BMCs and SBBs. If so necessary, NBA should form a separate body/committee to address the issues of tech transfer and this will also facilitate the stakeholders involved in a positive way. This independent committee/body should revisit the typological frame of tech transfer in India after due consideration of existing gaps.

The Debatable Scheme: *UPOV* v. *Farmers'Rights*

If we shift our focus to other international legal framework with respect to protection of bio-resources, we will find UPOV model on plant varieties. Several scholars believe that UPOV is not plausible for India because of its incompatibility with farmer variety. UPOV only addresses industrial agriculture. Therefore any possibility to grant PBRs to these farmer varieties has been discarded. In a way, ABS ensures a better stand than UPOV model.

Even though, India is considered to be an agriculture driven country, still a very little has been deliberated upon farmers rights. It has often been said that the concept of Farmers' Rights is based on equity considerations to compensate traditional farmers for their past contributions in improving and making available Plant Genetic Resources for Food and Agriculture (PGRFA). While the concept had already been introduced in FAO discussions in the early 1980s and is now well established, the debate has recently turned to the question of how to best implement farmers' rights.[15] Here, a market based solution, that is treating Traditional Plant Genetic Resources

15 Christoph Antons, Sui Generis Protection For Plant Varieties And Traditional Knowledge in Biodiversity and Agriculture: The International Framework and National Approaches In The Philippines and India IJLT 9 (2010).

for Food and Agriculture (TPGRFA) as private goods is often contrasted with a compensation solution, in which TPGRFA remain in the public domain, but the nation states where they occur are empowered to negotiate compensation for their traditional farming sectors.[16] The Protection of Plant Varieties and Famers' Rights Act of 2001 is the only enactment, which delves into farmers' rights. When, we already have PPVFR, why DST mooted for BRAI by completely ignoring farmers' rights in it? Is it because PPVFR is based on UPOV 1991 (which according to some, is not feasible for India) model or is it because, it is not feasible for industrial mindset? There is no doubt; PPVFR stands in a better footing regarding commercial breeders' rights. It also ensures a registration mechanism but the conflicting goals come to expression in the preamble of the Act. On one hand, it speaks of the necessity "to recognize and protect the rights of farmers in respect of their contribution made at any time in conserving, improving and making available plant genetic resources for the development of new plant varieties", while on the other hand it regards plant breeders' rights protection as a necessary precondition "for accelerated agricultural development" and "to stimulate investment for research and development" as well as to "facilitate the growth of the seed industry."[17] There is also a strong belief that IPR deserves an equal protection to promote R&D. In a period of globalization of research and development, production and trade, which is predominantly based on private property, free trade and free competition etc. - thus on market economy principles - it cannot be denied that it is a necessity for intellectual property rights throughout the countries participating in this global process to be granted very similar, if not equal, standards of protection.[18]The impact of intellectual property rights on biological diversity cannot adequately be judged in an isolated way. Rather it must be seen in the context of the entire complexity of a given national economy. It is up to the legislators to counteract excessive use of single successful varieties.[19] Most developed countries are inclined

16 Ibid.

17 Id. at 20.

18 Joseph Straus, The Rio Biodiversity Convention and intellectual property IIC 610 (1993).

19 Id. at 609.

towards protection of IP by extended patent protection while most of the developing countries' may be inclined to opt for those alternatives in the intellectual property field that mitigate the monopoly rights to be conferred on plant varieties.[20] Breeder's rights seem, in this regard, a preferable option vis-à-vis patents given the latter implications in respect of the use of harvested material by the farmer that obtained it, and the limitation on the use of protected varieties for further research and development.[21]

In spite of all these contentions and legislative stands, one must not forget that genetic/bio resources are common concern of mankind (previously known as common heritage of mankind) but if we put this logic on the template of availability and access might get affected because the principle of common concern moots for availability without restriction. Some scholars have identified this conflict as a question of ideology, where technocentric and ecocentric worldviews are clashing with each other. On one hand the technological supremacy of human beings over nature versus nature as a whole plays the supreme role, with human beings as an integral part of it.[22]

The Inference- call for environmentally sound thinkers & actors

Accommodating environmental concerns and balancing them with developmental aspects is a major challenge. Theoretically, we can contend and criticize the decision-making bodies but in practice, lessons are learned from the mistakes as well as checks and balance. India is reach in biodiversity, with mounting challenges of development; we have encountered new problems too. Compliance measure is a must in order to respect the international commitments. Environmental Justice delivery system has also evolved with time. Now, with NGT in action, the schematics of environmen-

Also See Evans, Impressions of Research on Agricultural Plants in the USSR 41 J. Aust. Inst. Agric. Sci. 155 (1975).

20 Carlos M Correa, Biological resources and intellectual property rights EIPR 161 (1992).

21 Ibid.

22 Angus J Wells, Patenting new life forms: an ecological perspective EIPR 116 (1994).

tal governance are also changing but its difficult to be the jack-of-all-trades; especially when the numbers of stakeholders and their interests are in question. IP law can run alongside with Biodiversity Law, only when there are clear demarcation of powers and privileges. Absolute freedom cannot be allowed in either case but we cannot forget the ethical concern for nature's non- human dimensions. A hardcore anthropocentric ethics will fail us and it is also morally defective. Development is our necessity but we should keep this in mind that we have no right to reduce the richness and diversity, just to fulfill our needs. Before we ask for policy change (as HLC has recommended and thereafter Parliamentary Committee has even junked it), there is a need for ideological change, which should appreciate the inherent value of environment. We need to compromise our higher standard of living and only after that, we can hopefully, create a balanced state of affairs. No matter, how far human mind travels and set its course to conquer nature, it should not forget the integrationist approach by not violating the natural form of our diversity. We are in a better position to realize and comprehend the cosmological reality of environment. Hence, we owe nature for the damages we have done to her, both by innovation and environment protection.

FROM NUREMBERG TRIBUNAL TO INTERNATIONAL CRIMINAL COURT: A STUDY ON PROSECUTING INTERNATIONAL CRIMES

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Abstract

The idea of setting up an International Criminal Court can be traced as a backwash of the World War I. On the backdrop of several heinous crimes being committed in the twentieth century, the need for an International body that could punish crimes of international magnitude had long been felt. The process to achieve the same however, has been slow as well as painstaking. The period of development of the Statute for the permanent International Criminal Court and other criminal tribunals after the Nuremberg Tribunals can be divided into several distinct phases, each of which has been discussed in the paper. The period after World War I saw the development of several legal precedents to prevent further incidents of war crimes, war of aggression and crimes against Humanity. This was accompanied by a universal determination by several world leaders to avoid any such similar crimes in the future and an implied promise to condemn the same by putting the law before any nation or individual. Even though the coming into force of the Rome Statute of the International Criminal Court on July 1, 2002 was one of the most important events in the evolution of the International Criminal Court, it is seen that the Court now has had to go through some rapid transformation to cope with the different legal systems. The International community has gone through tremendous changes over the years and are now entering a new era presently where the primary intention is to not let any perpetrator of International crime enjoy impunity. The paper would analyse the nature of prosecution of international crimes and how the nature of such prosecution has changed since the Nuremberg Trials to the trials done by the ICC today. Further, the paper will also focus on the difference in the scheme of trials done by the Nuremberg Tribunal and the ICC thereby focusing on how the method of prose-

cuting International crimes has developed over the years.

Introduction

International Criminal Law, an amalgam of International Law and Criminal law has marked its presence directly or indirectly among the Nations for decades. Although the primary focus of the Modern International Criminal law is to secure and maintain International legal order and peace by preventing criminal violations internationally, yet historically it was believed that it was necessary for the acts to violate domestic regulations to be considered an international crime.

The twentieth century had witnessed several acts of mass violence in several countries.Probably the greatest manifestation of which was the holocaust in Germany. Millions of people were murdered in countries like Russia, Cambodia, Vietnam, Sierra Leone, Chile, the Philippines, the Congo, Bangladesh, Uganda, Iraq, Indonesia, East Timor, El Salvador, Burundi, Argentina, Somalia, Chad, Yugoslavia and Rwanda in the second half of the past century.[1]

The International Military Tribunals at Nuremberg and Tokyo initiated the introduction of an International Criminal justice system as it was for the first time that individuals were held criminally liable for crimes committed by them. Later, the crimes committed in Yugoslavia and the genocide in Rwanda, led to the establishment of the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) by the United Nations Security Council. Next to these tribunals, international criminal courts and tribunals have been set up to try international crimes committed in Sierra Leone (since 1996), Cambodia (1975-1979), East Timor (1999) and Lebanon (2005).[2]However, the predecessor of the International Criminal Court (ICC) is primarily the Nuremberg and the Tokyo Tribunals. Although they are accused

1 Tove Rosen, The Influence of the Nuremberg Trial on International Criminal Law, THE ROBERT H. JACKSON CENTER (Apr. 10, 2017, 12:30 PM), https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/.

2 International Criminal Prosecution, ALETTE SMEULERS: INTERNATIONAL CRIMES AND CRIMINOLOGY (Apr. 10, 2017, 12:48 PM), http://alettesmeulers.org/index.php/en/research/international-criminal-persecution.

of being unfair and partial towards the justice for the winning bloc, what cannot be rejected is the idea that these tribunals had laid the groundwork for the development of a modern day International Court that would work for recognising individual accountability and reject the historically accepted defences of state sovereignty.

THE NUREMBERG TRIBUNAL

The history of the Nuremberg Tribunal can be traced back to the Word War II when the Allied Powers were faced with the dilemma of dealing with the captured German war criminals with the option to either release, summarily execute or try the war criminal.[3] Subsequently, on August 8, 1945 the Allied powers signed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers.[4]Although there were several claims about the existence of a tradition, where the members of the armed forces of an enemy state committing war crimes were tried, no such case had taken place in the 19th and 20th century before the Nuremberg trials[5]. It was for the first time that individuals were tried separately for war crimes. This was because of the connotation that instituting criminal charges against the responsible office holders after the end of the hostilities would result in no gain and would only serve as an obstacle in establishing peace among the different countries again.

The agreement had 30 Articles with each of them being considered in such a way that it was acceptable to all the four members who represented the United States, France, Great Britain and Soviet Union. It was under Article 1 of this Charter that the IMT (International Military tribunal) was established to sit at the palace of Justice in Nuremberg, Germany.

While there have been debates among scholars regarding the Versailles Treaty against the German Kaiser being the starting point of International Criminal Lawand yet what must also be consid-

3 Tessa McKeown, The Nuremberg Trial: Procedural Due Process at the International Military Tribunal, 45 VUWLR, 109, 110 (2014).

4 The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, Yale Law School "The London Charter of the International Military Tribunal 1945".

5 Christian Tomuschat, The Legacy of Nuremberg, 4 JICJ, 830, 830-31 (2006).

ered is that unlike in the Nuremberg trials, the German Kaiser was not subjected to have committed any offence punishable under the International law. The Nuremberg Tribunal and the trials that followed after its establishment has had a substantial impact throughout the field of International Law. The Judgment and the Charter of the Nuremberg Trials were recognised as Nuremberg Principles by the United Nations' International Law Commission in 1950 which in many ways have set the Principles of International Law. In addition to this, the Nuremberg Trials also played an instrumental role in development of the law of war including the Geneva Conventions and International Human Rights Law[6]. But the greatest possible legacy that the Nuremberg trials left was the establishment of a permanent international court which was achieved in 1998 when the United Nations Diplomatic Conference of Plenipotentiaries adopted the Statute of the permanent International Criminal Court. Thus, without the Nuremberg Trials, there would have been no ad hoc tribunals and probably no International Court of Justice to prosecute the perpetrators of the grave crimes in international community irrespective of their nationality or rank. Preventing war, to repress and end crimes against peace and fighting against aggressive armed forces was and probably continues to be the main lessons and challenges emanating from the Nuremberg Tribunals. [7]

THE PERIOD AFTER NUREMBERG: THE TOKYO TRIBUNAL

The legacy of the Nuremberg Tribunal was ensured once the newly elected United Nations in 1946 adopted the principles of Nuremberg Charter. Another very significant development after the Nuremberg Trials was the formation of a tribunal similar to the IMT known as the Tokyo Tribunal which tried 28 Japanese military and political leaders. Japan, which was put under the control of Supreme Commander of the Allied Powers, established by an executive decree the

6 Philippe Kirsch, President of the International Criminal Court , The Nuremberg Heritage: A Series of Events Commemorating the Beginning of the Nuremberg Trial, INTERNATIONAL CRIMINAL COURT (Apr. 18, 2017, 10:54 PM), https://www.icc-cpi.int/nr/rdonlyres/08ab9f8f-53a2-4533-bce0-887419726332/143894/pk_20051119_en.pdf.

7 Hans-Peter Kaul, The Nuremberg Legacy and the International Criminal Court—Lecture in Honor of Whitney R. Harris, Former Nuremberg Prosecutor, 12 WUGS LR, 637, 642 (2013).

International Military Tribunal for the Far East (IMTFE). Although the Charter of the IMTFE provided for a maximum of nine Members in the Tribunal, it finally contained judges from 11 countries, one each from every country that Japan had been involved in a war with.

However, the Tokyo Tribunal came under a lot of scepticism with the Indian Judge questioning the exclusion of crimes committed by the Allied and the absence of judges from the defeated nations. It was in these circumstances that the legacy of the Tokyo Tribunal was put under scrutiny with there being serious doubts over the procedural fairness of the trial. Such Tribunals, however, led to the idea of creating a codified institution to oversee international peace. The criticism in particular also relates to the crimes against peace and questions the use of the concept of conspiracy, the legal status of the crime prior to the elaboration of the Charters for Nuremberg and Tokyo and the alleged derogation from the principle of *nullum-crimen sine lege.*[8]

The Impact of International Law Commission (ILC)

The period from 1954 till 1980 has largely been described as a period of inertia as the Cold War continued to have its toll on the ICC.[9] The United Nations was hugely successful in prosecuting the offenders through the establishment of the IMT and the IMTFE, but the inevitable association of these Tribunals with 'victor's justice' prompted them to establish an International body to establish impartial mechanisms to administer international criminal justice. The efforts of the UN in this respect can be traced along two separate tracks: codification of international crimes and the elaboration of a draft statute for the setting up of an international court to try and prosecute those responsible for commission of international crimes. Pursuing this goal, the ILC on the request of the General Council on November 21, 1947 commenced the formulation of principles that were recognised in the Nuremberg Tribunal, to draft a code for the punishment of offences against the peace and security

8 HEMAN A.M. VONHEBELet al. ed., REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, 22(1st ed. 1999).

9 Id at 8.

of mankind.[10]

The UN General Assembly adopted the Convention for the Prevention and Punishment of Genocide in 1948 while the four Geneva Conventions regulating the conduct during war were revised and adopted in 1949.[11] Together with the Genocide Convention, the General Assembly also instituted the idea of creating an international judicial organ in order to try persons accused of genocide or other international crimes. However, such an idea was shelved with the beginning of the Cold War and it was later in 1994 when the General Assembly responded again in a positive manner and a draft report was prepared by the ILC. Moreover, in 1981, the UN General Assembly had invited the ILC to resume its work on the draft code of Offences against the Peace and Security of Mankind and in 1991 the ILC was able to conduct its first reading of the draft Code of Crimes[12] against the Peace and Security of Mankind.

The Preparatory Committee which had representatives from the member States of the UN held fifteen weeks of meetings from March 1996 to April 1998. The text which was prepared from the protracted and intense negotiations, closely followed by a global coalition of non-governmental organizations, was a complex document containing more than 1300 "bracketed" provisions representing divergences of views between governments.[13]

In the Conference held on June 15, 1998 the General Assembly famously negotiated with the diplomats of 160 states and brought them into a consensus to ultimately adopt the Rome Statute of the International Criminal Court, which ultimately led to the subsequent establishment of the International Criminal Court (ICC) in 2002.

International Criminal Tribunal for Yugoslavia (ICTY)

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10 ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 323 (2nd ed. 2008).

11 Leila Nadya Sadat, The International Criminal Court: Past, Present and Future, WASHINGTON UNIVERSITY IN ST. LOUIS (Apr. 17, 2017, 8:12 PM) https://law.wustl.edu/harris/documents/ICC-PastPresentFuture4-16-14.pdf.

12 Resolution 42/151 of 7 December 1987, the title of the draft was changed from Code of Offences into that of Code of Crimes.

13 Id. at 12.

The response of the Security Council to the armed conflict between the republics of Yugoslavia led to the creation of ICTY under Chapter VII, by Resolution 827 of May 25, 1993. The Security Council justified its step by providing that the widespread occurrence of violations of international humanitarian law constituted a threat to international peace and security and that such crimes needed to be put to an end.[14] The Tribunal enjoyed criminal jurisdiction over the four primary crimes including grave breaches of the Geneva Conventions of 1949 under Article 2, violations of the laws and customs of war under Article 3, genocide under Article 4 and crimes against humanity under Article 5, all of which were conducted in the former Yugoslavia. The ICTY has concurrent jurisdiction and also enjoys primacy over national courts, which implies that the Tribunal can ask for the deference of cases from domestic courts to the Tribunal at any stage of the procedure[15]. The Tribunal consisted of Trial Chambers formed by three judges each and an Appeals Chamber, consisting of five judges. There was also one Prosecutor. The Tribunal was formed by the UN Security Council by exercising its powers conferred under Chapter VII of the UN Charter. On the other hand, the Tribunal and its organs enjoyed completeindependence in the exercise of their mandate[16].

The initial work of the ICTY was halted due to the refusal of all the states to co-operate. Infact, it was only the Bosnian Government which was supportive, but with people responsible still serving in high positions in countries like Croatia, Serbia, or *RepublikaSrpska*the Tribunal was criticised as it could only try the low-ranking soldiers. However, this period helped the Tribunal to contribute in the development of International Criminal Justice by creating a body of jurisprudence to try and prosecutethose responsible forthe commission of international crimes in the future, a principle which has also been adopted by the International Criminal Court. By 2001, Serbia also began to co-operate when it handed over Milosevic to the Tribunal. As of September 2011, the ICTY had indicted

14 HEBEL et al., supra note 8, at 28.

15 International Criminal Trial for the former Yugoslavia Statute art. 9(2), May 25, 1993.

16 HEBEL et al., supra note 8, at 29-30.

161 persons and convicted 64.[17]The Tribunal was also criticised for creating a court with jurisdiction limited by temporal and spatial factors and that it was established to make up for the inefficiency of the diplomacy and politics. The ICTY has set out a number of achievements on its own.[18] This report of their achievements however highlight that the focus was on increasing accountability of the individuals committing the violations including the leaders, in giving justice and voice to the victims, in establishing the facts relating to the crime committed, in strengthening the rule of law and lastly, in contributing towards the development of International Law.

International Criminal Tribunal for Rwanda (ICTR)

The difference between the Ad hoc Tribunals at Yugoslavia and Rwanda from that of the Military Tribunals at Tokyo and Nuremberg was that unlike the latter, which were established by the victors, the former were established under the guidance of the United Nations Security Council. After the death of the Presidents of Rwanda and Burundi in April 1994, a large-scalecampaignaimed towards attacking the Tutsi community in Rwanda had started. Later, under the new Government an estimate of around half a million to a million civilians had lost their lives.[19] The Security Council alarmed by the humanitarian disaster and to establish peace and order in the region, through Resolution 955 under Chapter VII created a Tribunal to look after the atrocities and violations of International Law taking place in Rwanda on November 8, 1994. It must be noted here that although Rwanda was not a permanent member of the UN Security Council at the time, yet the Government had themselves requested to create such a tribunal but the refusal of the other members to include death penalty in the sentencing regime of the court led to the government voting against the Tribunal.

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17 The Role of ICTY in the Making of History,FORUM FOR LEVANDE HISTORIA(Apr. 17, 2017, 9:24 PM), http://www.levandehistoria.se/sites/default/files/wysiwyg_media/dlh_the_role_of_icty.pdf.

18 Achievements, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA(Apr. 17, 2017, 9:47 PM), http://www.icty.org/sid/324.

19 International Criminal Trial for the former Yugoslavia Statute art. 9(2), May 25, 1993.

The jurisdiction of the Tribunal included crimes such as genocide under Article 2, crimes against humanity under Article 3, violation of Article 3 common to the Geneva Conventions and of Additional Protocol I under Article 4. It also had the similar powers to that of the ICTY in matters of primacy and co-operations.[20] It shares the same structure including the similar Trials Chamber and Appeals Chamber and Prosecutor but had their seat in Arusha instead of The Hague.

The ICTR through its judgments and decisions created a significant archive for international criminal law. In particular, the ICTR jurisprudence provides abundant interpretative material on the legal nature and factual realities of the crime of genocide[21].In the case of *Prosecutor v. Akayesu*, for the first time an international tribunal was called upon to interpret the definition of genocide as provided for under the Genocide Convention.[22] Apart from this, for the first time rape was recognised as a means of committing genocide, the role of media in the context of mass crimes was also examined in detail. These are some other significant areas which the Tribunal had dealt with. The Tribunal was also the first after the Nuremberg Tribunal to give any judgment against the Head of a Government. But the single most important contribution of the Tribunal was that through its written decisions and in-court rulings it created a wealth of information with respect to procedural issues and which in due course will also serve as an integral source for the development of international criminal law.

In 2003, the ICTR was given a completion strategy to that of the ICTY as a result of which it began to transfer cases back to the national jurisdictions. However, there has also been several criticism of the Tribunal particularly because of the slow pace at which the cases are tried. It has also been criticised for the failure to bring into trial the offences committed by the Rwandan Patriotic Front (RPF) during the genocide.

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20 Malcolm D. Evans, INTERNATIONAL LAW, 772 (3rded. 2010).

21 Erik Møse, The ICTR: Experiences And Challenges, 12 NEW ENGJ. INT'L& COMP. LAW 1, 4 (2005).

22 Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, p.p. 112-13 (Sept. 2, 1998).

The Establishment of International Criminal Court (ICC)

As discussed earlier, the idea of establishing an International Criminal Court had arisen as far back as in 1947, but the Cold War created hurdles to its development and the idea was shelved. However, in 1989, the General Assembly through Resolution 44/99 requested the ILC to establish an International Criminal Court that would deal with war crimes and aggression. Moreover, the success of the ad hoc tribunals in Yugoslavia and Rwanda, despite their limited power and jurisdiction, further provided a spur to the General Assembly to initiate the establishment of ICC. The statute of the ICC was finalised in 1998 after several negotiations in Rome but the functioning began only in 2002 when the ICC Statute obtained 60 ratifications.

There were several factors that played a significant role in the adoption of the Rome Statute. The emergence of a group of about 60 like-minded countries that were committed to the core principles of the Rome Statute and in the establishment of the ICC, the emergence of a powerful NGO coalition- the Coalition for the International Criminal Court (CICC) which served as a crucial information dissemination function during the conference by providing information to small delegations and by using all other available means to communicate the status of the conference.[23] Moreover, the role played by the group of distinguished diplomats in developing a compromise between the three groups with contrasting opinions on various subject matters must be credited, as they significantly contributed to the adoption of the Statute in the Conference.

In terms of jurisdiction*rationemateriae*,although the draughtsmen of the Rome Statute considered the inclusion of several other crimes under the jurisdiction of the Courtsuch as acts of terrorism, drug trafficking, hostage-taking, andaggression, only those universal “core crimes” were included which found a place in treaties or formed part of customary international law rather than adding treaty crimes whose universality could be questioned[24].

The ICC has jurisdiction over genocide, war crimes, crimes against

23 Sadat, supra note 11.

24 Id. at 23.

humanity and the crimes of aggression. But such jurisdiction on crimes of aggression lays dormant unless the particular State in question has previously accepted the jurisdiction of the Court or when the situation has been referred by the United Nations Security Council. It is only as recent as 2017 that the ICC has decided that it has jurisdiction over the crime of aggression. Article 11 of the Statute also signifies that the jurisdiction of the ICC is only prospective in nature meaning that the States that were not a party on the date when the court came into being can only be brought under its jurisdiction when they make a specific declaration under Article 12 and become a party to the Statute after its entry.

In matters of prosecution, there are three ways in which jurisdiction over a crime may be triggered. Any State party to the Rome Statute can request the ICC to investigate. This has given rise to the process of self-referral, where states have often referred matters on their territories to the ICC. This has happened in the cases of Uganda, Democratic Republic of Congo and the Central African Republic.The ICC may also begin an investigation by the method of Pre-Trial Chamber which was applied in the post-election violence in Kenya. In such cases the ICC can initiate an investigation on its own. The last way to initiate an investigation is through the Security Council's recommendation as was done in the case of Darfur, Sudan in 2005 in Resolution 1594.[25]

The difference of jurisdiction in case of ICC from that of ICTY and ICTR is that whereas these ad hoc Tribunals were given supremacy over the national courts, in case of the ICC it is 'complementary' in nature. The ICC can only exercise jurisdiction when the national court is 'unwilling or unable genuinely' to prosecute a case by itself. [26] Therefore, the ICC is barred from exercising its jurisdiction in cases where the national court has asserted its jurisdiction. However, there is the exception in cases where the court can justify the exercise of its jurisdiction over a matter. The significant matter in this aspect though is the determination of 'unwillingness' or 'inability' of the court.

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25 Evans, supra note 20, at 775.

26 Rome Statute of the International Criminal Court art. 17, Jul. 1, 2002.

In case of arrest of people, it is only the Pre-Chamber that can at the request of the Prosecution issue a warrant of arrest. The court does not have any power to authorize arrests directly, it is the responsibility of the particular state in question. Securing arrest is a complex process that requires the commitment of significant police and military resources.[27] The court does not have its own police force, and therefore relies on the states co-operation. Another essential for the arrest of any person is the presence of necessary political will of the state. The ultimate responsibility to execute an arrest warrant against any person lies with the state who can also delegate such arrest actions to a third party such as the peace-keeping forces or the police forces of other states. It is thus clear that, while the court forms the judicial pillar of the State set up, the States take control of the operational pillar, including the enforcement of the Court's order.[28]

There have also been several critics of the ICC. The United States has alleged the ICC of violating International Law by exercising its jurisdiction over non-state parties. There have also been several questions on the jurisdictional aspect of the ICC. Nationals, if part of any State which is not a party to the Statute cannot be governed by the ICC. This limits the jurisdiction of the ICC, even in cases when grave violation takes place. Several weaknesses of the Rome Statute were also highlighted in the indictment of President Al Bashir. The ICC did not have jurisdiction over Sudan as it is not a member State; it was able to arrest him only after it was referred by the Security Council. The weakness of the ICC was highlighted when the African Union (AU) states (Kenya and Chad), in-spite of ICC's indictment refused to arrest President Al Bashir. The AU cited Article 98 of the Rome Statute for justifying their action, claiming that the AU does not have to comply with the ICC's request as the President had the immunity as a sitting head of State and so cannot be prosecuted. This situation arose because of the confusion created by the Rome Statute, which does not give immunity to the heads

27 Hans-Peter Kaul, The ICC and International Criminal Cooperation-Key aspects and Fundamental Necessities, THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS, 90.

28 Understanding the International Criminal Court, INTERNATIONAL CRIMINAL COURT(Apr. 24, 2017, 8:02 PM), https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf.

of the State of member states; it does not clearly state its position in matters of non-member states. Moreover, the presence of Article 98(2) puts forward the view that in case the States already had prior agreements they can go against the requests of the ICC, and in this case the AU's position was already in conflict with that of the ICC, therefore Kenya and Chad being members of the AU had the authority to not comply with the ICC. The Rome Statute is also silent on the repercussions for the member States that are in breach of the Rome Statute as it merely cites that the situation in such cases would be referred to the UN Security Council. [29] Moreover, after the Kampala Amendments on the Crime of Aggression, it requires the commission of an "act of aggression" that "by its character, gravity and scale constitutes a manifest violation of the United Nations Charter."[30] The fact that for the conviction of the crime for such a breach the responsibility of the State is required, it raises questions over the jurisdiction of ICC. The ICC only has jurisdiction over criminal responsibility of individuals but questions over the jurisdiction of the ICC over State responsibility for breach of International law are still unclear. The ICC has also been criticised for only having tried the African leaders and that it has failed to investigate equally severe conflicts elsewhere. The ICC has been largely criticised for being biased against the African countries as most of its investigations have been against them. In the past five years, several African governments have spoken out against the court and its intervention on this ground.[31] However, it is also to be noted that many of the investigations being undertaken by the ICC were referred to them by the governments of the respective countries themselves.

PROSECUTION OF INTERNATIONAL CRIMES: THE NUREMBERG SCHEME VERSUS THE ICC SCHEME

The establishment of International Criminal Court and Tribunals has often raised the controversy concerning the relationship between such courts with the national courts, especially in cases where concurrent jurisdiction arises. In such cases, two models

29 Evans, supranote 20, at776.

30 Rome Statute of the International Criminal Court art. 8 bis(1), Jul. 1, 2002.

31 Mark Kersten, The Africa-ICC Relationship – More and Less than Meets the Eye (Apr. 24, 2017, 8:26 PM), https://justiceinconflict.org/2015/07/17/the-africa-icc-relationship-more-and-less-than-meets-the-eye-part-1/.

have been established till today in International law: the Nuremberg model and the ICC model. In the Nuremberg model, the International Court were entrusted the task to handle the major leaders accused of International crimes whereas, the national courts were called upon to handle the criminal offences of minor culprits.[32]

The roles allotted to international criminal courts in contrast to national courts become of immense importance. The two primary frameworks so far are that which was adopted in Nuremberg while the other is the ICC.Under the scheme adopted in Nuremberg, the international court was assigned to address the issue of major leaders who were accused to have been part of international crimes. On the other hand, the national courts were to deal with the crimes of minor culprits. For example, after World War II, the German courts were to adjudicate on those matters where Germans had committed crimes against other crimes while for those crimes committed by Germans against foreign nationals, the courts of the Allies were to adjudicate. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were initially aimed at replacing the national courts of those states which failed to dispense justice – either due to their inability or because of their unwillingness. The ICTR focused on trying the military and civilian leaders while the Rwandan courts were to try the minor offenders. It is to be noted that the ICTY did not initially conceive a divide between major offenders and minor offenders but has over time shifted towards the Nuremberg scheme. The ICTY now concentrates on cases involving political or military leaders or such other major defendants and has been asking national courts to try the lesser accused[33]. On the other hand, the Statute of the ICC follows a very different structure under which all crimes, irrespective of their magnitude and the status of the offender, are to be tried in the national courts. The ICC gets involved only when these national courts fail at delivering justice by their inability or unwillingness. Moreover, the case should be of '*sufficient gravity*' to justify the Court's action.

The Nuremberg scheme has much merit as there is a better chance of impartiality and a lesser chance of hostility towards the offend-

32 Cassese, supra note 10, at 341.

33 Cassese, supra note 10, at 345.

ers, the major leaders, of international crimes when the case is tried by the international court. Moreover, for very serious and large-scale crimes, such as crimes against humanity, which are committed by central authorities and or are backed by them, it becomes very difficult for national courts to prosecute the perpetrators as they are in power. Even if there is a change in government, and the perpetrators are brought to book, there might be political agendas which may prevent fair and impartial delivery of justice. As such, international courts are expedient to try such crimes committed by major leaders which will also provide the advantages of international criminal justice. While the rule of complementarityin the Statute of Rome may seem dubious in such cases, it is up to the Court to interpret and apply the relevant provisions of the Statute so as to assert the jurisdiction of the Court whenever such cases are brought before the Court.

In the two ad hoc Tribunals in Rwanda and Yugoslavia on the other hand gave principle followed was the primacy of the Tribunals over the national courts. It must be pointed out here that both these Tribunals were military Tribunals that at some point or the other gradually moved towards the Nuremberg Scheme. However, the ICC scheme that is followed today is different from that of the Nuremberg scheme. A complimentary scheme rather than primacy over national courts is followed. In the ICC scheme, all crimes must be brought before the national courts irrespective of the magnitude of the crime. The role of ICC comes up only when the national courts are unwilling or unable to do justice or when there is sufficient ground for the Court to justify its interference.

The ICC like the Nuremberg Tribunal was also set up with an objective of holding individuals accountable for serious violation of International crimes. The ICC has built upon the Nuremberg Tribunal in several ways. The definitions and elements of crimes are defined in a much more detailed manner than in the Nuremberg Tribunals or in the ad hoc Tribunals. Moreover, with the changing needs and the coming up of the Genocide Convention, 1948 established solidity of the offence of genocide in the customary International law leading to the adoption of the offence of genocide in the Rome Statute. The ICC further reiterated more precisely the principles of Nuremberg Tribunal that any person irrespective of his status or responsibility

can be held accountable for their actions. [34]

However, there lies certain differences between the two. The ICC, unlike the Nuremberg Tribunals, was not set up to deal with crimes that had already taken place and thus cannot act in an ex post facto manner. The crimes that the court can try are already defined in the Statute and it can only exert its jurisdiction over those countries which have already become a part of the Statute. To do justice to the comparison of the two-scheme followed in the Nuremberg Trials and in the ICC, one must understand that the circumstances of both were different. The Nuremberg Trials were done after the war was over and there has been several criticisms of it as being victor's justice. The ICC on the other hand is an active court that continuously monitors any kind of International Crimes. It faces several logistical problems which were absent in case of Nuremberg trials.

The absence of the International Criminal Court's own police force is one of the biggest difference between the two. As Ben Ferencz said, all societies need laws, courts and enforcement. The enforcement capabilities are in the hands of the States and not the Court which makes the co-operation of the States necessary in arresting and surrendering of the persons wanted by the court. Similar co-operation is also essential in providing evidence, relocating witnesses, and enforcing the sentences of the Court. Therefore, maintaining co-operation of the States is an essential element for the success of the ICC.[35]

CONCLUSION

It is a fact that for the better part of the twentieth century there was no law to prosecute those responsible for international crimes such as war crimes and crimes against humanity. Although the development of International Criminal Law during the first forty years had been slow and painstaking, it has taken up tremendous pace in the recent years. One of the primary reasons for such development is the availability of jurisprudence on international criminal law which started gaining momentum only in the later half of the twentieth century. The most important contribution of the Nuremberg

34 Kirsch, supra note 24.

35 Id.at 34

Trial is that it for the first time showed the world, that any heinous acts committed by either the state or any individual would not be put above the law and that such actions would be condemned. The Nuremberg Tribunals for several other reasons has also served as a precedent to its successors. With the coming of the new International Criminal Court, states have started to actively participate in the implementation of international human rights law with several states even enacting legislations with due regard to the potential scope of the International Criminal Court's jurisdiction, especially with regard to the "principle of complementarity", with the intention of ensuring that all the crimes within the Rome Statute are covered by some domestic penal law. While it is true that there have been several developments that are being made to the International Criminal Courts and the process of prosecuting crimes, it cannot be denied that there are several other issues that need serious attention. The unavailability of any enforcement agency which can help the court in collecting evidence, searching documents or in executing arrest warrants and other judicial orders is a prime area of concern.[36] The absence of such agency also creates the problem of heavy reliance on the states for their assistance for any of the activities ranging from the collection of evidence to the arrest of the persons accused. The complexity of the issues with which the International Courts deals with and the dependence on the states for their good will also results in excessively lengthy proceedings as a result of which justice in most cases get delayed. Another significant flaw that the persecution of crimes in International Courts suffers from is their inability to punish everyone associated with the crime. They cannot practically try every person in a state who has been involved in the commission of any heinous crime and it is mostly the high-ranking officers or the leaders who are tried by such courts. But looking from the perspective of the victims and survivors they want all such perpetrators to be punished for their actions. However, in-spite of these deficiencies and allegations of 'Nuremberg Syndrome', the International courts have kept its structure intact and with the changes adopted by such courts to adopt with the changing laws of different countries, such drawbacks cannot taint the efficiency of the process of prosecuting international crimes.

36 ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 269 (3rded. 2013).

EFFECT OF INFORMATION TECHNOLOGY ON THE ABUSE AND EXPLOITATION OF CHILDREN: OVERVIEW & PREVENTION LAWS IN INDIA[1]

The Child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fullness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique mental immaturity and incapacity to look after themselves. That is why there is growing realisation in every part of the globe that children must be brought up in an `atmosphere of love and affection.....In India this consciousness is reflected in the provisions enacted in the Constitution.[2]

Hon'ble Justice P. N. Bhagwati, Former Chief Justice of India

Abstract

In the last few decades there has been a great awakening the world over as regards the recognition and the implementation of child rights. Many International Conventions have been adopted by the United Nations and our Parliament has also enacted various important special laws for the protection of child rights. The Supreme Court of India and various High Courts have also emphasised the importance of protection of child rights and have been keeping a close vigil on the implementationof these significance laws. In the continuance of protection of the child, they also need to be protected from the Cyber World. The rapid spread of information and communication technologies (ICT) in India has created a wealth of opportunities for economic growth, the spread of knowledge, lowering the cost of education, social networking, democracy and better governance and accountability. The use of social networking sites has hit almost every corner of the world in cyberspace. The huge popularity of the social networking sites have caught us by surprise. The Researcher studying degree of separation between two people on social networking have proposed that:-

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1 Mr. Dinesh Dayma, Assistant Professor of Law, National Law University and Judicial Academy, Assam. Email- dinesh.d@nluassam.ac.in

2 Lakshmi Kanth Pandey v. Union of India, AIR 1984 SC 469

"*the average number of acquaintance separating any two people no matter who they are, is not six but 3.9. In India, millions of people use social networks. Whereas in 2013, the number of users was 86.7, the figure is expected to raise to 197 million social networking users in 2017.*[3] While India's Internet coverage is still lagging behind that of other BRICS countries, especially among poor, rural and remote people, the country is rapidly catching up and offers the largest untapped market for Internet access, especially through smartphones.[4]

Today's children have wide access to internet via mobile phones, laptops, tablets, desk tops, and other devices. They are fascinated by such devices and scouring the internet for all types of information. In India, it is estimated that about 134 million children have mobile phones. The number is growing by leaps and bounds. Also, with broadband expansion, these children will have faster access to internet by 2017.

The author finds that the growth of information and communication technologies (ICT) has benefits as well as negative impact on society (especially children). The problem is multiplied manifold in an area like pornography, which has as its basic certain "moral" standards and uses controversial parameters like "indecency" and "obscenity"[5]which are fluid, varying both temporally as well as cartographically depending upon social values.

INTRODUCTION

India has the most number of children in the world. William Wordsworth, a natural poet, has said, *'the child is the father of man'*. We say, a child is the reflection of God and assure him care and protection. Every child has a dream to become a good profes-

3 Available at http://www.statista.com/statistics/278407/number-of-social-network-users-in-inida/ (accessed July, 2017)

4 Report on 'Child Online Protection in India' published by UNICEF, New Delhi available at http://unicef.in/Uploads/Publications/Resources/pub_doc115.pdf (accessed July, 2017)

5 The Supreme Court has recognised that the standard of "morality" is not a uniform or inflexible standard but varies according to different communities or ages as well as a number of historical, ethics and social conditions. Abbas v. Union of India, AIR 1971 SC 481

sional or to serve the nation in one or another form, but all are not lucky enough, some of them come into conflict with the law by one or another reasons, before attainingage of majority.

Traditionally both interfamilial offender and strangers have found that young children and teenagers are perfect target for the criminal acts because they are often trusting, naïve, curious, adventuresome and eager for attention and affection. However, the most attractive factor to predators is that children and teenagers historically have not been viewed as credible witness. Today the danger to children is ever greater because the Internet provides predators anonymity. Whether the victimization occurs in person or over the Internet, the process is the same- the perpetrator uses information to target a child victim. For example, the predator may initiate an online friendship with a young person, sharing hobbies and interests. This may lead to the exchange of gifts and pictures. Just like the traditional predator who targets children in person, the online predator usually is willing to spend considerable time befriending and grooming a child. The predator wants to build the child's trust, which will allow the predator to get what he or she ultimately wants from the child.

Although no family member is immune to the possibility that their child may be exploited and harassed on the Internet, a few factors make some children more vulnerable than others. Older children tends to be at greater risk because they often use the computer[6] unsupervised and are more likely to engage in online discussion of a personal nature. Some victim become unwilling participants as they actively participate in chat rooms, trade, e-mail messages and send pictures online. The risk of victimizations is greater for emotionally vulnerable youth who may be dealing with issues of sexual identity. These young people may be willing to engage in conversation that is both titillating and exciting but appears innocent and

6 Section 2(i) of Information Technology Act, 2000-means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network;

harmless. Unfortunately, Internet interactions that initially appear innocent can gradually lead to sexually explicit conducts.

On a different note the growth of multidimensional and fast-changing nature of technology and social media poses extraordinary challenges for the prevention of and response to child online abuse and exploitation. In order to establish child online protection systems, adequate structures, coordination mechanisms, capacities and resources need to be established. Conventional legislative frameworks and law enforcement are not effective to protect children from Internet and these laws are also ineffective to address the modern form of crimes in the cyber world.

According to latest research report on "*Mobile Internet in India*", stated that there were 306 million mobile Internet users as of December 2015. Of these, 219 million users are from urban India and 87 million from rural India. There was a remarkable growth of 77 per cent from December 2014 and the mobile Internet user base is projected to reach 371 million by June 2016.India Internet of things (IOT) opportunity is expected to grow 7 times to move from $1.3 billion in 2016 to $9 billion by 2020.[7]

As we all know that the development of digital technology offer significant development and educational benefits for children. The technology advancement give exposure to potential risks of online abuse and exploitation. Cyber offences against children are increasing and diversifying as new methods are used to harass, abuse and exploit children. In many cases offline and online violence are interrelated, with online abuse also including offline components. Non-contact abuse can be harmful to children and can facilitate the transition to contact abuse. Being able to stay anonymous online and impersonate others may embolden people into offensive and criminal acts and lower the deterrent potential of laws.

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7 Deloitte Report on "Technology, Media and Telecommunications Predictions 2017", 7th editions available at:

https://www2.deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-india-predictions-2017-noexp.pdf (last accessed on July, 2017)

ONLINE RISKS AND THREATS FOR CHILDREN IN INDIA

There are various threats to children in cyber space, including child pornography, sexual grooming,[8] sexual harassment and cyberbullying.[9] Most children are unaware of these problems and realize that they have been victimized by a cybercriminal only when the damage has been done. On the other hand, parents either have inadequate information about need and the means through which they can safeguard their children on the internet or may have little time or resources or training to ensure they adopt steps to safeguard their children on the internet. The Global Youth On-Line Behaviour Survey conducted by Microsoft declares that 53% of the children between ages 8-17 in India have become victims of cyber bullying.[10] Most cyber bullying cases were arising out of social media and encounters on Facebook comprised 60% of these cases. Mobile phones and on-line chat rooms were second and third factors which comprised the remaining 40% cases. Moreover, many social network sites do not use or deploy age verification mechanism as a result of which children create fake profiles and are able to access adult content. Predators contact teenagers and children over the Internet and victimize them by:

Enticing them through online contact for the purpose of engaging them in sexual acts.

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8 Preparing a child, significant adults and the environment for sexual abuse and exploitation or ideological manipulation. (The new Terminology Guidelines define grooming as "the process of establishing/building a relationship with a child either in person or through the use of the Internet or other digital technologies to facilitate either online or offline sexual contact with that person".)

9 Cyberbullying is bullying that takes place using electronic technology. Electronic technology includes devices and equipment such as cell phones, computers and tablets, as well as communication tools including social media sites, text messages, chat and websites. Examples of cyberbullying include mean text messages or emails, rumours sent by email or posted on social networking sites, and embarrassing pictures, videos, websites or fake profiles. According to the Cyberbullying Research Centre in Jupiter, Florida as the "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."

10 The Report Prepared by Cross-Tab Marketing Services & Telecommunications Research Group for Microsoft Corporation, United States, available at http://www.cross-tab.com/ (last accessed on August, 2017)

Using the Internet for the production, manufacture and distribution of child pornography.

Using the Internet to expose youth to child pornography and encourage them to exchange pornography.

Enticing and exploiting children for the purpose of sexual tourism (travel with the intent to engage in sexual behaviour) for commercial gain and or personal gratification.

There are four types of online victimization of children. They are:

Sexual solicitation and approaches: Request to engage in sexual activities or sexual talk or to giver personal information that were unwanted or, whether wanted or not, made by an adult. This includes the modern form of online grooming.

Aggressive sexual solicitation: Sexual solicitations involves offline contact with the perpetrators through mail by telephone or in person or attempt or request for offline contract.

Unwanted exposure to sexual material: when online, opening e-mail or opening e- mail links and not seeking or expecting sexual exposed to pictures of naked people or people having sex. This also includes the new form of cyber-crimes like sexting.

Harassment: Threats or other offensive content (not sexual solicitation) sent online to the youth having or posted online for others to see.

CURRENT FORMS OF CHILD ONLINE ABUSE AND EXPLOITATION:

Cyberbullying: Cyber bulling is considered as the most happening cyber harassment in the Internet age to children. While there is no universal definition available for cyber bullying, the term has often been defined from the precept of usage of the technology and the harm that is caused to the child. Cyber bullying can thus be defined as digitally sending or publishing offensive words which may or may not be accompanied by abusive image including cartoon which belittle the receiver child, not limited to himself but also a vast audience. Cyber bulling is done preliminary to execute anger, frustration and hatred of the sender against the receiver and trans-

mitted mainly through internet and mobile phones. The perpetrator may choose either the email services or the social networking sites or chat forums or any other internet bulletin board to convey the message to the receiver child. In U.S. Megan Meier Cyber Bullying Prevention Act highlights the issue of cyber bulling as one of the first legal provision in the world addressing the issue. This law was made with a specific ambition to prevent cyber bullying targeting children. Section 2 of the act states that "Cyber bullying can cause psychological harm, including depression; negatively impact academic performance, safety and the well-being of children in school; force children to change school; and in some cases leads to extreme violent behaviour, including murder and suicide."[11]

Online sexual abuse: distribution of sexually explicit and violent content, sexual harassment

Online sexual exploitation: production, distribution and use of child sexual abuse material (CSAM) (child pornography), "sextortion", "revenge pornography"

Cyber extremism: ideological indoctrination and recruitment, threats of extreme violence

Grooming: preparing a child, significant adults and the environ-

11 (1) Four out of five of United States children aged 2 to 17 live in a home where either they or their parents access the Internet.

(2) Youth who create Internet content and use social networking sites are more likely to be targets of cyberbullying.

(3) Electronic communications provide anonymity to the perpetrator and the potential for widespread public distribution, potentially making them severely dangerous and cruel to youth.

(4) Online victimizations are associated with emotional distress and other psychological problems, including depression.

(5) Cyberbullying can cause psychological harm, including depression; negatively impact academic performance, safety, and the well-being of children in school; force children to change schools; and in some cases lead to extreme violent behaviour, including murder and suicide.

(6) Sixty percent of mental health professionals who responded to the Survey of Internet Mental Health Issues report having treated at least one patient with a problematic Internet experience in the previous five years; 54 percent of these clients were 18 years of age or younger.

ment for sexual abuse and exploitation or ideological manipulation

Sexting: Misuse of mobile phones or internet is also seen in cases where use of SMS or web services such as WhatsApp is being used to send obscene messages or video clips instantly. Such cyber criminals often conceal their true identity, age and gender to cheat vulnerable children. The cybercriminals (who may even be known to children) entice children to create their own 'selfies', that is own nude pictures and mail or SMS them instantly.

Phishing: It is a financial crime where cyber criminals could send emails to children or adults to extract personal sensitive information such as credit card details or net-banking details and harm them by making unauthorized debits to the victim's account causing wrongful loss to him.

Identity theft: Identity theft means stealing another person's identity /Password and/or hijacking their online account to post or send humiliating pictures or other illegal content. This can also be used to create fake profiles on Social networks.

Email spamming is a common cybercrime: Spamming means to send unsolicited mails to someone and in most cases it disguises the real origin of a message. It may be specifically directed at a child to intimidate him with offensive, disturbing or menacing content.

Malware infected files breaching privacy of children: Cyber criminals are using more sophisticated tools to commit cybercrimes. They are using new mechanisms to defraud children by use of technical tools, software and malware, particularly in Social networking websites. They conceal their true identity by spoofing (i.e. concealing true identity and garbing a fake identity) and hiding their IP addresses, infecting the systems by introducing viruses, Trojans, key loggers (spyware) or trigger software which open a web cam unauthorised.

Online sexual harassment: Unwelcome sexual advances, request or demand for sexual favour, and other verbal or physical conduct of a sexual nature. "Sexual harassment" refers not only to sexual conduct with the explicit intention to violate the dignity of another person (i.e. purpose) but also to conduct of a sexual nature that a

person experiences as offensive or intimidating.

The prime instigators of cyberbullying are generally other children and young people. Some studies have suggested that more girls than boys bully online; other reports suggest the reverse.[12] The Research from Canada and the United Kingdom identifies children who are at risk of being bullied offline (for example, children who may be perceived as 'different', such as minority ethnic groups, lesbian, gay, bisexual or transgender (LGBT) young people, overweight children, or those with perceived disabilities) to be at greater risk of being bullied online than other children.[13]In contrast, research from the United States has found that those who physically bully others at school were themselves likely to be victims of electronic bullying.[14] Although cyberbullying does not yet appear to be a common experience, it can have a significant impact on children and young people because of its anonymity, its capacity to intrude at any time of day or night into places that might otherwise offer respite and sanctuary – homes and bedrooms – and by its nature to often extend (sometimes unwittingly) to implicate and involve many people.

THE WAY TOWARDS ONLINE SAFETY FOR CHILDREN

To increase the number of victims that are identified, several states have decided to mainstream victim identification into their investigations and prosecutions, by integrating specific victim identification procedures. Various developing countries like Albania and Montenegro furthermore intend to make systematic use of channels for international cooperation in order to enhance victim identification and to improve coordination between states. There are various methods to protect children from online crimes globally and in India.

12 Sharif, Shaheen, Cyber bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace, International Journal of Cyber Criminology, Vol 1 Issue 1 January 2007.

13 See, for example: Keith, Susan, and Michelle E. Martin, 'Cyber-Bullying; Creating a culture of respect in a cyber world', Reclaiming Children and Youth, vol. 13, no. 4, Winter 2005, pp. 224–228; and Sharif, Shaheen, Cyber-Bullying.

14 Raskauskas, Juliana, and Ann D. Stoltz, 'Involvement in Traditional and Electronic Bullying among Adolescents', Developmental Psychology, vol. 43, no. 3, May 2007, pp. 564–575.

The main aims to promote to *Cyber Securities Awareness Month (CSAM)* is provide Cyber security on new technology, and also getting vulnerable to the kind of attacks that it is unable to anticipate. To achieve the objectives of Digital India, the country needs a robust cyber security infrastructure — both in terms of personnel and technology — which is changing at a fast pace."[15]

Another aspect with respect to *cybercrime investigation* is domain of police to do investigation involving online child abuse and exploitation in India. Law enforcement agencies are doing effective investigation with the help of Information Technology and cyber law to complete that investigation. In India at present there are 23 cybercrime cells doing these investigations with the help of Cyber forensic laboratories using computer network and mobile forensics and for training on cybercrime and cyber forensics.

The Government of India should take initiative in matter of cybercrime and create a new department for police training and forensic experts to assist in investigation. The *National Police Academy*also conducts training courses on cybercrime and forensics for Indian Police Service officers. CERT-In and the Centre for Development of Advanced Computing train law enforcement agencies, forensic labs and the judiciary in collecting, analysing and presenting digital evidence.

International cooperation is the key to tackling challenges of jurisdiction in the online environment. Indian authorities are able to obtain support from Indian Internet service providers (ISPs), but face major challenges in getting cooperation in accordance with Indian laws from global social media platforms, search engines and ISPs, most of which are under United States jurisdiction.

One of the key gaps identified in this assessment is the *general lack of understanding of professionals, policymakers and society* as a whole of the risks and threats posed to children by ICT and social

15 Marc Kahlberg, Director and Group CEO, Vital Intelligence Group, told Business Line on 29August, 2017 Available at http://www.thehindubusinessline.com/info-tech/india-lagging-in-cyber-security-awareness/article9046626.ece (accessed July, 2017)

media.[16] No single agency can ensure the safety of children from online abuse and exploitation. Relevant government institutions, the private sector, international organizations, academia and civil society have to work together to build structures, mechanisms and capacities to prevent and respond to child online abuse and exploitation. A safe online ecosystem for children requires technical solutions and a high degree of preparedness, collaboration and coordination among stakeholders. A number of initiatives raise awareness of online risks.[17] The Role of Government: DEITY, part of the Ministry of Communications and Information Technology, has launched a five-year project on information security, education and awareness. This programme promotes awareness of information security among children, families and professionals.

LEGISLATION AND POLICIES TO PROTECT CHILDREN ONLINE

Existing policies and laws: India's policy and legal framework for cybersecurity is evolving and, despite its limitations, provides a base for building a comprehensive strategy for child online protection.

The Communication Decency Act, 1996

America had passed the Communication Decency Act (CDA), 1996 under the Clinton administration, which attempted to restrict access by minor to "patently offensive description of sexual or excretory activities." In particular, the CDA specified that it applied to material available over an "interactive computer services" which included the Internet. However, in the U.S., with its moral liberal constitutional framework, speech, which is not '*obscene'* but merely '*indecent*', is protected by the First Amendment, which guarantees the Freedom of Speech and Expression. The fact that the CDA also sought to prohibit 'indecent' speech had far-reaching consequences- even information regarding AIDS and birth control would have

16 Srivastava A, et al., Towards Digital Inclusion: Barriers to Internet Access for Economically- and Socially-Excluded Urban Communities, Centre for Communication and Development Studies, Pune, 2015

17 Mani, Sunil and V Sridhar, 'Diffusion of Broadband Internet in India: Trends, Determinants and Challenges', Economic and Political Weekly, vol. 1 No. 51, December 2015. www.epw.in/system/files/pdf/2015_50/51/Diffusion_of_Broadband_Internet_in_India_0.pdf last accessed on June 2017. (accessed August, 2017)

fallen into this definition, especially as the Act failed to define 'indecent'. Thus, the American Civil Liberties Union (ACLU), and others challenged the constitutional validity of these provisions as it would reduce what was available to the adult population to only what was fit for children.[18] The Supreme Court struck down the impugned provisions as unconstitutional holding-

"*As a matter of constitutional traditions, in the absence of evidence to the contrary, we presume that Government regulation of the content of speech is more likely to interference with the free exchange of ideas than to encourage it. The interest is encouraging freedom of expression in a democratic society outweighs and theoretical but unproven benefits of censorship.*"[19]

The Obscene publication Acts, 1959

The Obscene publication Acts, 1959 & 1964 as amended by the Criminal Justice and Public Order Act, 1994[20] cover material that has the effect pf 'depraving and corrupting'. An offence is committed if a person 'publishes' an obscene article[21]mere possession is not enough but possession for publication for gain is punishable.[22] Furthermore, the act has been recently amended to clarify the stand that 'publishing' includes transmitting electronically stored data. [23]Several issues concerning publication were brought to the notice of the court in two cases concerning paedophilia.[24]Furthermore, the law now recognises as publication photographs[25] stored on computer and even digital altered images especially used by paedophiles to merge the bodies of adults with the face of children's.[26]

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18 ACLU v. Reno, 929 F. Supp.831

19 ACLU v. Reno, 929 F. Supp.831

20 This Act was introduce with specific intention of dealing with Internet pornography. See House of Common, Home Affair Committee: First Report on Computer Pornography (HMSO), 1994)

21 Section 2 of the Obscene publication Acts, 1959.

22 Section 1(5) expands the concept to also cover cases where there is an exchange of data instead of payment.

23 Section 1(3) as amended by section 9 of the Criminal Justice System.

24 R v. Fellows, R v. Arnold (Decided on 27September, 1996)

25 Section 7(4)(b) of the Protection of Children Act, 1978

26 Section 7(7) of the Protection Children Act, 1978

The Children's Online Privacy Protection Act, 1998:

The following laws exist to address cybercrimes: the Children'sOnline Privacy Protection Act, is a legislation aimed at safeguarding the privacy of children below the age of 13 whilechildren use the internet. The act provides information that is allowed to be collected from a child including his/her name, residential address, telephone numbers and social security number. The act mandates that a website owner ought to procure the express information about children. It also stipulates that on the websites meant for children, disclosure of personal information should not be a prerequisite. For example on a gaming website. As regards the provisions to protect children's privacy are concerned there is no such special statue in India. Special provisos against child pornography,[27] distribution of obscene content[28] and punishment for violation of privacy[29] are contained in IT Act, 2000 itself.

The Information Technology Act, 2000[30]:

The Information Technology Act, 2000, provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.[31] The Act also provide penalties for damages to computer system and failure to protect data and furnish the information and such activities which may fall within the ambit of the Act. The IT Act also dealt with the protection of child under Chapter XI of the Act. The Act also provide for online activity and use of any communication device to transmit any data.

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27 Section 76B of the Information Technology Act, 2000.

28 Section 67,67A and 67B of the Information Technology Act, 2000.

29 The Video Privacy Protection Act, 1998.

30 http://lawmin.nic.in/ld/PACT/2000/The%20Information%20Technology%20Act,%202000.pdf (accessed August, 2017)

31 The Information Technology Act, 2000

The National Policy for Children (NPC), 2013[32]

On April 18th, 2013 the Union Cabinet approved the National Policy for Children to help in the implementation of programmes and schemes for children all over the country. The policy gives utmost priority to right to life, health and nutrition and also gives importance to development, education, protection and participation. The Constitution of India guarantees Fundamental Rights to all children in the country and empowers the State to make special provisions for children. To affirm the Government's commitment to the rights based approach in addressing the continuing and emerging challenges in the situation of children, the Government of India has hereby adopted this Resolution on the National Policy for Children, 2013. Through this policy the State is committed to take affirmative measures – legislative, policy or otherwise – to promote and safeguard the right of all children to live and grow with equity, dignity, security and freedom, to ensure that all children have equal opportunities; and that no custom, tradition, cultural or religious practice is allowed to violate or restrict or prevent children from enjoying their rights.[33] But this policy does not address directing to online activity and risk related to child. The Government of India also draft a new policy or amend the existing policy in respect of online crimes (especially children) and prevention for them.

The National Cyber Security Policy, 2013:[34]

Cyber security is an increasingly important domain from the warfare and law and order point of view. The flip side of the freedom of the internet is that there are few rules to prevent wrong acts. Countries attack each other to steal sensitive information, and criminals fool customers into giving them financial information. In the recent U.S. elections, Russia was accused of hacking and releasing damaging documents from the Hillary Clinton's campaign. This shows

32 http://www.childlineindia.org.in/The-National-Policy-for-Children-2013.htm(accessed August, 2017)

33 Available at http://childlineindia.org.in/The-National-Policy-for-Children-2013.htm (accessed August, 2017)

34 Available at http://meity.gov.in/content/national-cyber-security-policy-2013-1(accessed August, 2017)

the impact that hacking can have.[35] This policy also address issues regarding investigation and prosecution of cybercrimes including online child crime. This policy also protect the nation and its citizens from cyber threats.

The Indecent Representation of Women (Prohibition) Act, 1986:[36]

This act provides to prohibit indecent representation of women through advertisements or in publications, writings, paintings, and figures or in any other manner and for matters connected therewith or incidental thereto.[37] The Act also prohibits indecent representations of women and criminalizes the performance of obscene acts and songs but does not punish the audience or those who make the person perform such acts.

COMPREHENSIVE SUBSTANTIVE CRIMINAL LAW

A number of states intend to identify shortcomings in their national substantive laws on child sexual abuse and to adopt the necessary legislative amendments. This will include criminalization of all forms of online child sexual abuse offences in line with international standards. For EU Member States, again the baseline is provided by Directive 2011/93/EU[38] on combating the sexual abuse and sexual exploitation of children and child pornography. This requires, for example, the criminalization of viewing child pornography without downloading it, watching child sexual abuse through live streaming, acquiring or possessing of child pornography, grooming as well as soliciting children to provide sexual images of themselves. Denmark also intends to adopt new legislation to strengthen the protection of children against abuse. With respect to Indian legislation the

35 Available at http://www.thehansindia.com/posts/index/Civil-Services/2016-12-09/An-overview-on-cyber-security-policy-in-India/267807 (accessed August, 2017

36 Available at

http://ncw.nic.in/acts/TheIndecentRepresentationofWomenProhibitionAct1986.pdf (accessed August, 2017)

37 The Indecent Representation Of Women (Prohibition) Act, 1986 (NO. 60 OF 1986)

38 Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:jl0064 (accessed August, 2017)

Information Technology Act have been strengthened by the Protection of Children from Sexual Offences Act, 2012 which deals with online offences against children, including child pornography and grooming. As the Information Technology Act does not have specific provisions for criminal intimidation, hate speech and defamatory content, the provisions of the Indian Penal Code apply in cases of online offences.

INDIAN LAWS IN CHILD PORNOGRAPHY:

Child pornography is banned in almost all the countries across the world.[39] Section 67B[40] bans publishing or transmitting of material

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39 In United States v. X-citement video, US 115 Ct 464- court held that for offences of child pornography prosecution is required to prove defendant knew that sexually explicit nature of material and the person shown in the material were under 18 year age .

40 67B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form.- Whoever,-

(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or

(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or

(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or

(d) facilitates abusing children online or

(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that the provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

(i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

displaying children in sexually explicit act, in electronic form. Creating text or digital image, collecting, seeking, browsing, downloading, advertising, promoting, exchanging or distributing child pornography material depicting children in obscene manner is banned by Section 76B. Any person who enticesa childfor a sexually explicit act or in a manner that may offend a reasonable adult using computer resources or abuses children ina manner that may offend a reasonable adult on the computer resource or abuses children on the internet or records electronically "own abuser that of others pertaining to sexual explicit act with children" is punishable with imprisonment for a term that may be extend to five years and fine upto 10 lac rupees. In India, many instances of prosecution involving child pornography and adult pornography have been reported.

JUDICIAL PRONOUNCEMENT ON CHILD PORNOGRAPHY:

Recently in a petition filed before the Supreme Court of India, the court directed the Government to find a solution to block porn sites including child pornographic material as this was a major threat posed to children on Internet.[41] In 2004, the Delhi public school MMS containing obscene material was put up for sale on an auction site, Bazee.com and widely circulated which clearly violated Section 67 of the IT Act, 2000.[42]*Tamil Nadu v. Suhas Katti*,[43] is the first case of conviction under IT Act, 2000 where accused was held

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(ii) which is kept or used for bonafide heritage or religious purposes

Explanation: For the purposes of this section, "children" means a person who has not completed the age of 18 years.

41 Centre must find the solution to block porn sites: Supreme Court (29 August, 2014) , The Hindu available at: http://www.thehindu.com/news/national/difficult-to-block-international-porn-sites-centre-tells-sc/article4908878.ece (accessed August, 2017)

42 Available at https://indiancaselaws.wordpress.com/2013/10/20/avnish-bajaj-vs-state-dps-mms-scandal-case/ (accessed August, 2017)

43 4680 of 2004 Criminal Complaint, Additional Chief Metropolitan Magistrate Tamil Nadu Judgement delivered on 5th November, 2004. Available at :www.img.kerala.gov.in

guilty under section 469[44], 509[45] of India Penal Code, 1860 and section 67of the IT Act, 2000 and sentenced to undergo two years imprisonment for posting of obscene material or message about a divorced woman in Yahoo message group. In another incident an obscene MMS clip of a student at Amity University at Noida was circulated by an accused name Sanjeev Raj Bawa by hacking into the victim's mail account.[46] In such scenario, section 43, 66 and 66C of IT Act, 2000 are attracted. In the case of *Bachpan Bachao Andolan v. Union of India*,[47] The Supreme Court of India passed specific direction to protect the children's right to live with human dignity and against child exploitation and abuses.

In the case of *M. Saravanan & Dr. L Prakash v. State*[48] where doctor photographed and video recorded several women engaging in obscene activates that he distribute through Internet to make illegal money and the petitioner was prosecuted under section 67 of the IT Act, 2000. The technological measures such as blocking of objectionable material, filtering adult content and software such as net nanny proves useful in preventing children from accessing the objectionable material. Child abuse cases are known to have decreased in United States and Australia. The office for National Statistics, UK reported that 27 per cent decrease was found in the sexual abuses of children in the period of 2003-2007.[49]

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44 Section 469- Forgery for purpose of harming reputation.—Whoever commits forgery, 1[intending that the document or electronic record forged] shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

45 Section 509- Word, gesture or act intended to insult the modesty of a woman.—Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

46 Available at www.mid-day.com/news/2009 (accessed August, 2017)

47 2011 (5) SCC 1

48 Madras High Court Writ Petition No.7313 of 2002

49 Jones L. and Finkelhor, D. "The Decline in Child Sexual Abuses cases, Bulletin, 2001, Washington, DC: US Department of Justice, Office of Justice Programme, Office of Juvenile Justice and Delinquency Prevention.; Dunne,

CONCLUSION

The new law appear to be set in place and it will operate upon anyone who is within jurisdictional net. Anyone within the country or the area of operation of law who is carrying on a business in cyberporn will be liable under the law just as booksellers and even video operates were. However, therefore it would be beneficial to look into the concept of *Governance of the Internet* rather than a Government for the Internet. The former does not requires any one single hierarchical impositionary structure but instated consists of hybrid paradigm of governance involving a multiplicity of actors.[50]

Protection of children from abuses and exploitation is main concern in India. Because the growth of Information Communication & Technology (ICT) having negative impact on society such as cyberbullying, online sexual abuse and exploitation, cyber extremism, cyber addiction and other risks and threats for children, it is evident that Indian children are being affected in many ways. However the technology and the Internet expand the socio-economic development and increase the education, business growth, scientific technology and many more evolution in India.

The multi-layered government system, using a mixture of national and international legislation and self-imposed regulations by ISPs and users (like parents for their children) and special organization to report pornographic content a more comprehensive approach can be taken to address the online child protection. The balance between the freedom of individual and greatest good of society can be maintained. The Supreme Court[51] held that "it is important that while interpreting section 67 of IT Act, the court may exercise its powers in the interest of society(children) and particular the influence of the 'obscene material in electronic form' on it. For protecting the interest of the children and abuse of children and explicate

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Purdie Cook, Boyle and Najman "Is Child Sexual Abuse Declining Evidence from a Population-Based Survey of MEN AND Women in Australia" Child Abuses & Neglect: The International Journal Vol 27(2), 2003, pp. 141-52.

50 The Concept has been admirably expounded in M. Gould "Rule for the virtual society", (1996) 10 International Review of Law, Computers and Technology 199.

51 Prakash v. State of Tamil Nadu,(2002) 7SCC 759

in the cyber world the State Government may have to apprehended perpetrators of "cyber obscenity" by invoking lock state legislation.

In the process of the protection of children in India the ITC played a key role to empowerment use of IT understood by the society. The relationship between violation against women and children. The social approach overall violation against women and children and mental condition need to be understood to find ways of approaching them. There is an urgent need to expand the information, data and knowledge based on online abuse and exploitation of children. In most of the cases the children are not aware about these accidents which occurred in cyberspace.

On the above problem the author finds some recommendation views which are-

Identifying and making an effective national framework which provides child online safety in society. For this objective we need support from different organizers and potential partnership with government agencies to monitor appropriate prevention and responsibility towards the child.

The key recommendation is to educate society in respect of use of Informational Technology and awareness about cyber issues and challenges (especially towards children). To make a strategy on digital literacy and safety of children. The government and academic institutions should also take part to make curriculum on digital safety and literacy which reaches every part of society including children's safety.

The third recommendation is to revise existing legal framework and policy related to child online and abuse and exploitation. Understand the cyber laws by the government agency and implement and use the technology for protecting children accordingly. To spread awareness about cyber laws and how it will affect children with help of computer and computer network.

Last one is regarding investigation and prosecution of online child sexual abuse and exploitation. The government needs trained legal and administrative officers according to cyber forensics and investigation in the matter of abuse and exploitation of children. They also established CSAM and reporting and legal investigation in this respect.

International registry for registration of geographical indications: critique of TRIPS developments.

- Rajesh Harlalka

Introduction

In the modern world, there are a huge variety of products having distinct qualities, which have a different kind of attraction. In general, all these qualities of a product are protected under intellectual property rights. Various products have distinctintive mark to show the uniqueness of the product and others have originated from a specific place, region, It has some conditions in common which make the product from such place a unique one and therefore in order to protect such product from other manufacturers we have Geographical Indications (hereinafter referred to as GI).

The Article 22 (1) of the agreement on Trade Related Aspects of Intellectual Property Rights, (hereinafter referred to as TRIPS Agreement) defines Geographical Indication as *"Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."*[1] Under the TRIPS Agreement, unless a GI is protected in the country of its origin, there is no obligation under the TRIPS for the other countries to extend the reciprocal protection.[2] Therefore, it becomes very important for any country to enact a domestic law protecting the Geographical Indication in order to gain protection under the TRIPS. Under Indian law, the Section 2 (1) of the Geographical Indications of Goods (Registration and protection) Act, 1999 defines GI as *"geographical indication, in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given*

1 Article 22 (1) of the agreement on Trade Related Aspects of Intellectual Property Rights.

2 B L Wadehra, "Law relating to Intellectual property", 5th edn., Universal law publishing Co, Pp. 457.

quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be."[3]

In general, a GI confers, to all producers from a defined region, an exclusive right to use GI to identify their product which possesses certain qualities, or distinct characteristics which are relevant to that particular geographical region. Thereby the function of the GI is that it points out to a specific place, which determines the qualities of the product which originate from there.[4] The most common example of "Darjeeling" indicated the origin of that tea from the Indian Region i.e Darjeeling. Another essential function of GI is to promote the goods of a particular region. Some critics have commented that it is an indirect protectionist measure, which undermines competition and negatively affects trade and commerce.[5] In order to recognize a product under GI, It is essential that these three elements are fulfilled, i.e. there must be a good, it must originate from a defined area and the good must have the qualities, reputation, and other characteristics, which are clearly linked to the geographical origin of goods. The term intends to include both concepts, indication of source, appellation of origin and symbols.[6]

This article intends to look at the GI from the historical perspective in order to gain an insight to the efforts of the international community in recognizing the GI. There were many international agreements signed, all of which has been analyzed to understand the existing problem. The article has has also attempted to provide a critique of the TRIPS agreement.

HISTORICAL DEVELOPMENT

3 Section 2 (1) of the Geographical Indications of Goods (Registration and protection) Act, 1999.

4 Steven A. Bowers, "Location, Location, Location: The case Against extending Geographical Indication protection under the TRIPS agreement,(2003)

5 I Calboli, "Expanding the protection of geographical indications of origin under TRIPS: old debate or New Opportunity", available at https://scholarship.law.in

6 L Baumer, "Various forms of protection of geographical indications and possible consequences for an international treaty", included in the symposium of the international protection for geographical indications,Portugal, 1993, WIPO publication, P 32

It is very evident that TRIPS agreement was a fundamental step towards protection of the GI. But there were various others efforts made to protect the GI internationally. With the expansion of trade and commerce in the 19th century, there was a need for international law for the protection of the GI. Prior to TRIPS agreement, there were three different agreement that protected the GI.

THE PARIS CONVENTION

The Paris convention of 1883 was the first multilateral convention, which made efforts towards the inclusion of GI. It was revised several times in Brussels(1990), Washington (1900), the Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967) and amended in 1979. It has 173 signatory states as on 22 October 2009. The Article 2 (1) of the Paris Convention provides

"The convention applies to the widest range of industrial property, including 'indications of source and appellations of origin and the repression of unfair competition'."[7]

The above article shows that the Paris Convention included 'indications of source and appellations' as the subject of Industrial property. This was the first international effort in recognizing GI. Prior to that, the GI ofa particular region was only recognized in that particular state itself. Further, the convention extended the protection of the GI as similarly provided in respect of goods unlawfully bearing a trademark or trade name. This has been provided in Article 10;

"False Indications: Seizure, on Importation, etc., of Goods Bearing False Indications as to their Source or the Identity of the Producer (1) The provisions of the preceding Article shall apply in cases of direct or indirect use of a false indication of the source of the goods or the identity of the producer, manufacturer, or merchant."[8]

It is very crucial over here to understand that the protection was only guaranteed against false and misleading use of GI and not the use of GI itself.[9] And also the protective measure extended to border

7 Article 2(1) of the Paris Convention, 1883

8 Article 10 of the Paris Convention, 1883

9 F Addor & A Grazioli, "Geographical Indications beyond Wines and Spirits: A

areas only.[10] The convention has also failed to define the 'Indications of source and appellations' and provide for an international standard for its protection. [11] Due to these drawbacks and certain others, the Madrid agreement was formed.

THE MADRID AGREEMENT

As discussed above the Paris Convention though it initiated the process of recognizing GI's, it had certain drawbacks. These were overcome in the Madrid Agreement concerning the International Registration of Marks (1891) and the protocol relating to that agreement (1989). The Madrid Agreement was revised at Washinton (1911), the Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967), there are 35 contracting parties as on 22 October 2009. The Madrid Agreement on Indications of Source not only prevents the use of "false" indications of source but also prohibits the use of indications of source that are "deceptive," i.e., literally true but nevertheless misleading. [12] The Article 1 (1) of the agreement;

"all goods bearing a false or deceptive indication by which one of the countries to which this Agreement applies, or a place situated therein, is directly or indirectly indicated as being the country or place of origin shall be seized on importation into any of the said countries."[13]

The Madrid Agreement provided specific rules for the false and deceptive indications of source. The Madrid Agreement introduced an additional protection for wines.[14] It extended protection to deceptive indications of source along with false indications.[15] The agreement had fewer signatories as compared to the Paris Convention. Under

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roadmap for a better protection for Geographical indications in the WTO\TRIPS agreements.

10 Ibid

11 Irene Calboli, "Expanding the Protection of Geographical Indications of Origin under TRIPS: Old Debate or New Opportunity", available at http://scholarship.law.tamu.edu/facscholar p 187

12 P Ganguli, "Geographical Indications Its evolving Contours" SVKM NMIMS University, Institute of Intellectual Property Studies, P 11.

13 Article 1 (1) of the Madrid Agreement for the Repression of false or Deceptive Indications of source of goods, 1891

14 Article 4 of the Madrid Agreement for the Repression of false or Deceptive Indications of source of goods, 1891

15 Ibid

this Agreement, it was possible to protect geographical indications as collective marks, certification marks or guarantee marks.[16]

THE LISBON AGREEMENT

As it can be deciphered from the above two agreements, the state parties to both Paris Convention and Madrid Agreement showed very less participation. Therefore,a serious attempt was made to protect the GI internationally through a new agreement.[17] The Lisbon Agreement for the protection of appellations of origin and their International registration was concluded in 1958. This agreement offered the strongest protection to GIs. There are 26 state parties to this agreement as on 22 October 2009. It was the result of the Lisbon Diplomatic Conference, 1958.[18] It had broadened the scope of protection.[19] The Article 2 had broadened the scope of protection.

"Definition of Notions of Appellation of Origin and Country of Origin(1) In this Agreement, "appellation of origin" means the geographical denomination of a country, region, or locality, which serves to designate a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors."[20]

Now the protection was extended to all indications of origin; the earlier protection only provided for false or deceptive uses of indication. [21] The agreement provided for proper definition of appellation of origin.[22] It further created a system of international registration

16 S Jain, "Effects of the extension of geographical indications: A south Asian Perspective", Asia Pacific Development journal, Vol 16, No, 2, Dec 2009

17 Irene Calboli, "Expanding the Protection of Geographical Indications of Origin under TRIPS: Old Debate or New Opportunity", available at http://scholarship.law.tamu.edu/facscholar, p 188.

18 P Ganguli, "Geographical Indications Its evolving Contours" SVKM NMIMS University, Institute of Intellectual Property Studies, P 16.

19 Ibid

20 Article 2 of The Lisbon Agreement for the protection of appellations of origin and their International registration, 1958

21 F Addor & A Grazioli, "Geographical Indications beyond Wines and Spirits: A roadmap for a better protection for Geographical indications in the WTO\TRIPS agreements.

22 Article 6 of The Lisbon Agreement for the protection of appellations of origin and their International registration, 1958

for indications of origin.[23] Lastly, a strong attempt was made to bring an international protection for GI but it achieved little result due to less participation by states, which was a major blow to the Lisbon Agreement.

TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

The Trade related aspects of intellectual property rights (hereinafter referred to as TRIPS) is basically administered by the WTO and set down minimum standards for any intellectual property. The TRIPS Agreement provides for wide coverage of GIs internationally and has the largest state signatory as all WTO members are parties to it.It came into effect on January 1, 1996 in developing countries and on January 1, 2000 in developing countries and on January 1, 2006 in underdeveloped countries.The Articles 22, 23 and 24 provides for GIs. The GI is defined under TRIPS under Article 22 (1):

"Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."[24]

The definition, as provided, has further expanded the scope of GI by the mere requirement of the reputation of the place of origin without the need for possessing any quality or characteristics. The minimum protection of all GIs is expressed in Article 22.The protection is limited to use of GI by producers not located in the region. The agreement contains only three distinct levels of protection. Firstly, for GI related to all products,[25] secondly, for wines and spirits[26] and lastly, for wines only.[27]The special category for wines represents the interest of European countries.[28] As a WTO agreement, it provides

23 J Manuel, "TRIPS agreement: towards a better protection for geographical indications", BROOK. J. INT'L .117(2004).

24 Article 22 (1) of the agreement on Trade Related Aspects of Intellectual Property Rights.

25 Article 22 of the agreement on Trade Related Aspects of Intellectual Property Rights.

26 Article 23 of the agreement on Trade Related Aspects of Intellectual Property Rights.

27 Ibid

28 S Jain, "Effects of the extension of geographical indications: A south Asian Per-

a systematic dispute settlement mechanism under WTO system.

In continuance with the prior Paris Convention and Madrid Agreement, the TRIPS agreement prohibits the use of false GI in member states.[29] In furtherance of the protection offered under Article 22, all the member state needs to invalidate or cancel the registration of a trademark which resembles GIs of another place of origin.[30] The member states have been given freedom to design their own legal means to protect GIs,[31] but it is essential to have enforceability mechanism.[32]

The Article 23 provides protection of wines and spirit in addition to prior protection. Therefore, the obligation is imposed on the member states to protect the wines and spirit of false origin. The provision also provides protection for Homonymous GIs.[33] And lastly, in order to facilitate and prevent unlawful use, it provides for a future multilateral system for negotiation.[34]

The last article for GI in TRIPS agreement, Article 24 emphasize the need for future negotiations between member countries.[35] And states can't refuse to conduct negotiations under this agreement. [36] The supervisory power has been granted to the TRIPS Council.[37]

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spective", Asia Pacific Development journal, Vol 16, No, 2, Dec 2009

29 Article 22 (2) of the agreement on Trade Related Aspects of Intellectual Property Rights.

30 Article 22 (3) of the agreement on Trade Related Aspects of Intellectual Property Rights.

31 A Lindquist, "Champagne or Champagne? An examination of U.S failure to comply with the geographical provisions of TRIPS agreement",

32 Article 41 of the agreement on Trade Related Aspects of Intellectual Property Rights.

33 Article 23 (2) of the agreement on Trade Related Aspects of Intellectual Property Rights.

34 Article 23 (4) of the agreement on Trade Related Aspects of Intellectual Property Rights.

35 S Escudero, "International Protection of Geographical Indications and Developing Countries", Working Paper 10, 2001.

36 Article 24 of the agreement on Trade Related Aspects of Intellectual Property Rights.

37 Article 24 (2) of the agreement on Trade Related Aspects of Intellectual Property Rights.

Critique:

As seen from the above history of GIs, there exist both sides in the international forum for recognizing GIs. Few states agree to protect GI due totheir own interest while the others reject it. These differences have failed to use the opportunity provided under Article 24. There is no doubt about the fact that local economies of the world have greatly benefited from the greater protection of GI. These extend the benefit beyond certain countries.[38] The Australian Wine industry is the testimony to this fact.[39] It is essential to note that unlike trademarks, GI is not owned by a single entity, it belongs to anyone producing a particular commodity in a particular region. Therefore the use of registered GI in advertisements, parodies, etc should not be restricted unless it constitutes unfair or unlawful activity.

One of the major problems that still exist, is that there are no explicit geographical boundaries, which is protected. Further there is also no specific defenses against its unauthorized use. [40]Due to national interest at stake, the cancellation of various trademark and for the protection of local economies has led to a very complex turnin the ongoing GI debate.[41]

38 Irene Calboli, "Expanding the Protection of Geographical Indications of Origin under TRIPS: Old Debate or New Opportunity", available at http://scholarship.law.tamu.edu/facscholar, p 200

39 Europe's Trademark: protecting Names, Economist, Aug 2, 2003, P 49

40 Irene Calboli, "Expanding the Protection of Geographical Indications of Origin under TRIPS: Old Debate or New Opportunity", available at http://scholarship.law.tamu.edu/facscholar, p 202.

41 Irene Calboli, "Expanding the Protection of Geographical Indications of Origin under TRIPS: Old Debate or New Opportunity", available at http://scholarship.law.tamu.edu/facscholar, p 203.

Marriage and Divorce Law among Indigenous North East Tribes of India: Comparative Study of Mizoram and Meghalaya

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Abstract:

The unique and peculiar cultures of indigenous tribes of North East India had been successfully preserved from time immemorial. The Constitution mandates protection of their culture, customs, traditions, language etc. against mainstream law, thereby enabling the conception of legal pluralism. The thriving of the matrilineal system in the state of Meghalaya is unique and peculiar which seems to be at crossroads owing to exposure to other tribal and non tribal patriarchal systems. Mizoram had moved towards formalising their customary marriage and divorce law which is a semblance of Mizo culture, traditions and also an attempt to create equal rights to persons in marriage. The paper aims to explore whether the tribal institutions of marriage are entrenched with strong gender biases and inequality in terms of rights, duties, remedies within the family and society at large. Thus, it is argued that the current transition of tribal customary law in this context is poignant and inevitable due to the changing socio-economic and political fabrics as tribal communities become more heterogeneous and complex.

Key words: Constitution, culture, legal pluralism, gender equality, socio- economic.

Introduction:

Marriage and divorce laws among the tribal people of the North East of India are more or less governed by the age old customary laws which have peculiar practices and rituals according to the peculiarity of each tribe. There are more than 160 scheduled tribes belonging to different ethnic groups and over 400 distinct tribal and sub tribal groups in the entire North East India[1]. They are

1 Report on North East India, MCRG (Aug. 09, 2017, 10: 30 P.M.), http://www.mcrg.ac.in/Core/

intertwined due to shared geographical location or language or administrative exigencies because of the British Colonial past[2] or assimilation into the Indian territory post independence. The North East states of India, which comprises of mainly tribal people, except for the state of Assam, Manipur[3] and Tripura, is among the most progressive states of India not in terms of governance rather in terms human development index ratio[4]. In the States of Arunachal Pradesh, Meghalaya, Mizoram and Nagaland which are predominantly tribal community the healthy coexistence of customary laws and customs along with the formal procedural and substantive law is a remarkable achievement of a living and thriving constitutional framework[5] of the Constitution of India. In the North East the fabric of the society is presumed to be more egalitarian owing to the absence of the caste system and class division. However, the idea of an egalitarian society in a narrow understanding of the gender construct[6] may appear egalitarian, but when seen in more intense context of the legal rights discourse of women in marriage, during and on dissolution of marriage and in the context of the related rights of maintenance, custody of a child and right to matrimonial property may reflect a strong gender bias.

Through this paper an attempt is made to explore the legal status of women in the state of Mizoram and Megahlaya within the exclusive domain of the *Mizo* society of Mizoram and *Khasi* community of Megahalaya with a poignant attempt at understanding the legal status of women in the realm of marriage and divorce laws.

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2 The Bengal Eastern Frontier Regulation of 1873 enacted during the British Colonial regime vide S.2 introduced the concept of inner line which mandated the prohibition of all British subjects beyond the inner line without proper formalities.

3 The state of Manipur though predominantly Hindus, it is also the home of 33 recognised tribes and sub tribes. The tribal communities who comprises of more than 34.41 per cent of the entire population of the state are predominantly Christians (2011 Census Report).

4 National Human Development Report (NHDR) (2011) http:hdr.undp.org/.

5 INDIA CONST. art. 371 cl. (A), (G) mandate that the applicability of the Naga and Mizo customary law and procedure in the states of Nagaland and Manipur.

6 As per the Preliminary Report of 2011 Census of India the child sex ratio is much healthier than the rest of States.

Mizo Women:

The socio-political experience of Mizo women in a Mizo society has its own peculiar experience marked by a different yardstick on the unique Mizo patriarchal notion of morality, chastity and social ordering and moorings crystallized over a period of time[7]. The external personal narrative of the Mizo community as a more egalitarian society could stand challenged the moment it is examined from the social construct of the Mizo society in a broader context of culture, tradition[8], religion[9] and politics. The Mizo society seems to have fallaciously placed (?) on the Mizo woman[10] while trivializing sexual offenses committed by man against women because in an event of illicit relationship where by an illicit child is begotten the one who had fathered the child could easily free himself from all his responsibilities by paying the traditional '*sawn man*' a token amount of Rs. 40 only.

The experience of the Mizo women's political participation in the state of Mizoram since 1972[11] and the eventual formation the Mizoram state in 1987 to the current discourse had been one of a mixed bag. The political participation of Mizo women in the exercise of their voting rights has been encouraging and exemplary. According to the last voter's list in 2013 for the state of Mizoram on August 13, out of the total voters 6,86,305 there were 3,49,506 female

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7 There is/ was notion among the Mizo that Mizo women were not supposed to have political or religious view as attributed by the Mizo proverb which says, "women and crabs do not have a religion".

8 The Mizo traditional dress called the 'Mizo puan' is occasionally worn by both sexes occasionally. The mizo male adorns himself with modern western attires on almost all occasion except during cultural event while his women counterpart is admonished upon by elders and religious leaders to wear 'Mizo puan' on maximum occasion, former or otherwise.

9 Educated mizo women with degree in theology are still discouraged from preaching and the responsibilities of pastoral and positions of elders in the church.

10 Mizo Women in a man made society, Hei Lei!! Mizo Nula (Aug. 28, 2017, 08:30 P.M.) http://azialo.blogspot.in2007/10/mizo-women-in-man-made-society.html.

11 In 1972 Mizoram was elevated from district council under government of Assam to the status of Union Territory thereby foray into a separate legislature of its own.

voters against 3,36,799 male voters[12]. However, Mizo women's political participation in the decision making process and women's representation is a contrast. The popular patriarchal mindset of being represented only by the male is so deeply ingrained that women candidates are fielded in an election only for the namesake not for the purpose of winning elections.[13]. Most of the political institution and village administrations are still strongly dominated and controlled by male members[14]. According to available data of the last general election in 2012, only a little above 10 per cent women legislator could secure election[15]. Thereby, rendering the argument that they propose 30 per cent reservation for women in Parliament and the State Legislative Assembly in the progressive community of Mizo society may not necessarily augur well for the Mizo women unless the Mizo community and the society takes a conscious radical departure from the deeply ingrained patriarchal mindset of only male dominion to an equalitarian political participation of men and women.

Mizo Women and Customary Laws:

The freedom young boys and girls enjoy in Mizo society with minimal restrictions is distinct and peculiar. Equal participation in social, religious, educational and economic activities by boys and girls, however, does not necessarily translate into equal socio-economic rights when analyzed in the personal law realms of marriage, divorce[16], maintenance, custody of the child and the contentious property right issues and challenges[17]. The rights and liabilities of

12 Tehelka Bureau, Women voters outnumber men, but no women's representation, TEHELKA.COM (Aug. 28, 2017, 10:30 P.M), http://www.tehelka.com/2013/10/.

13 Id.

14 Id.

15 Namita Bhandare, Empowered States have fewer women MPs, LIVE MINT (Aug. 28, 2017, 08:35 P.M), http://www.livemint.com/Politics/9hE13lizhlo3qqvJwghvZM/Empowered-states-have-fewer-women-MPs.html April 01, 2014.

16 According to Mizo customary law a Mizo husband can unilaterally dissolve marriage by uttering, "ka ma che" i.e. "I divorce thee" thereby effecting an actual divorce.

17 Mizo women as per their customs and traditions in most of the cases were never given any inheritance on death of her husband except on certain grounds of: i) in the absence of male relatives; ii) husband's family had paid the bride

Mizo men and women when studied in more holistic, contemporary discourse are likely to be inferred as exploitative and coercive. Thus, analysis of Mizo women's status in personal law matters is imperative without distorting the peculiarity of the Mizo customary laws.

*Mizo Marriage Laws***:**

The Mizo marriage is a conglomeration of Mizo customary and Christian form of marriage. Marriage among Mizo on the one hand, maybe a rigid customary form of marriage which require a process of courtship, engagement and finally settling for bride price in the traditional way to Christian or modern form of marriage where a social ceremony of marriage takes place in a Church ordained by a local priest followed by a feast for people who came to witness the marriage and bless the new couple. Marriage may also take place without social ceremony through a process of elopement called "*tlandun*"or by simply moving in, in cases where the girl became pregnant out of wedlock following which she quietly starts living-in with the boy responsible, the process is called "*luhkhung*"[18]. There is another form of marriage called "*makpa chungkhung*" wherein, if the bride is the only daughter of her parents and there are no other male heirs, the bridegroom goes to live in his wife's house without the need to pay the bride price[19]. This is an exceptional situation in an otherwise patrilineal society. In such marriage, there is a counter obligation of the son-in-law to care for his wife's parents when they are in old age.

*Bride Price***:**

The bride price paid at the time of marriage can be analyzed from two perspectives - economic perspective and the individual perspective. In the economic perspective, paying of the bride price reflects the recognition of female as an economically active member of the family, thereby the practice of paying bride price is for the purpose

price at the time of marriage; iii) in the absence of any legal heir. (Rule 109 of the Mizo Hnam Dan).

18 Customs of the Mizos: Mizoram (Aug. 28, 2017, 08:50 P.M) http://www.mizoram.nic.in/about/custom.htm.

19 Id.

of compensating the economic loss to the girl's parents' household on marriage[20]. However, when it is seen from the perspective of the wife's individual experience, the practice of bride price, payment might entail justification for treating wife as a disposable commodity[21]. In the absence of a sound jurisprudential basis[22] the noble practice of the bride price, which was conceived with the noble purpose of acknowledging the economic contribution of the female/ wife and also, for her the safeguard of her person and body,[23] it might turn out to be a tool for ill treatment, exploitation and subjugation of Mizo women in the society.

Matrimonial Causes and Mizo Women:

The Mizo customary law approach in matters of divorce is intrinsically patriarchal against women[24]. Though uncommon, Mizo man can simply divorce his wife by the unilateral declaration of, '*Ka ma che* ' which means 'I divorce thee'[25]. The unilateral pronouncement can effectively dissolve the marriage to the extent that wife loses her property and child custody rights. If lucky she is entitled to the customary '*hmeicche puan'* or the 'women raiment' comprising of

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20 Ruth Lalsiemsang Buongpi, Gender Relations and the Web of Traditions in Northeast India, Vol XI, No. 2, The NEHU Jour. (2013), at 78 (Aug. 28, 2017, 09:30 P.M), www.nehu.ac.in/public/assets/files/journals/JournalJuly_DecArt5111213.pdf

21 Tiplut Nongbri, Gender Issues and Tribal Development, Dr. B. Janardhan Rao, Tiplut Nongbri and Livinus Tirkey, Problems in Tribal Society: Some Aspects, RCICS, Paper No. 47: 17 at 36 (1998).

22 A legal frame work for prevention of women against domestic violence in tune with the Domestic Violence Act, 2005 must be initiated keeping the peculiar fabric of the culture and the traditions of Mizo society.

23 Apart from the symbolic gesture of the severance of the bride from her natal parental family the bride price had distinct and peculiar narrative of ownership of the brides person, property and body. Thus to ensure the well being of the bride- mentally, physically and economically, multiple layers of payment of bride price and to close relations like maternal uncle, sister- elder sister or otherwise and also to fictitious foster father. All these people are to ensure her well being in the marriage physical, mental or economical.

24 The Indian Divorce Act, 1869 No.4 Acts of Parliament 1869 (India) provisions are not applicable to the people of Mizoram though majority of the Mizo's are Christian.

25 Divorce to make Mizoram women poor, INDIAN EXPRESS, Guwahati April 02, 2010 (July 28,2017, 08:50 P.M.), http://archive.indianexpress.com/

a mattress, two pillows and her clothes[26]. The *'hmeicche puan'* is the only dowry a Mizo bride would traditionally carry to her new house after marriage. Mizo women across the spectrum- educated or uneducated, rich or marginalized are vulnerable to this radical patriarchal notion of divorce. This skewed tradition[27] may be interpreted as a one of the reasons for the systematic downgrading and the suppression of the status of Mizo women.

***Analysis of the Mizo Marriage, Divorce and Inheritance of Property Act, 2014*:**

The coming of the Mizo Marriage, Divorce, and Inheritance of Property Act, 2014, afterwards referred as 'the Act', after a protracted struggle by Mizo women society[28] and other pressure groups has been enacted to legally ensure equalisation of the status of men and women in marriage, during the subsistence of marriage and on the dissolution of marriage either by divorce or death. Keeping in view the strong influence of the Church on the day to day life of a common man in Mizoram, the Act envisages to make marriage a joint affair of both the Government and the Church[29]. It is expected that the new law would be instrumental in curtailing the unethical practice of unilateral divorce or the rate of divorce at large. Also, the new law is expected to entitle the Mizo women up to 50 per cent of the matrimonial property on divorce.

The Act extends to the whole of Mizoram state except for the three Sixth Schedule areas of Mizoram[30]. The Act is applicable to any person who is a Mizo tribe where both the parties to the marriage

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26 Ibid.

27 Linda Chhakchuak, Mizo Divorce: No longer a wink, THE HINDU- BUSINESS LINE Feb. 20, 2009 (Aug.28, 2017, 09:10 P.M.), http://thehindubusinessline.com.

28 Mizo Hmeiche Insuihkhawm Pawl (MHIP) or the Mizo Women's Federation had been demanding the need for reformation of the Mizo Customary law to be more equalitarian for the past 41 years.

29 PTI, New Mizoram marriage and inheritance of property law soon: Min, BUSINESS STANDARD, PTI Aizawl Dec.17, 2014 (Aug.28, 2017, 09:15 P.M.), http://www.business-standard.com/art.pti.

30 The Mizo Marriage, Divorce and Inheritance Act, 2014 No. 9, 2014 (India) S. 1. (2) of. The Sixth Schedule provisions is applicable only three districts of Chakma District, Mara District and Lai District.

are Mizos. In an event where one member of the party to a marriage is a Mizo, the Act will be applicable only if one other party to the marriage is a Mizo male[31]. Again, the word '*Mizo*' connotes the idea of a Mizo identity in different narratives of: a) Mizo by birth; b) Mizo by adoption and c) acceptance by the Mizo Society and Community at large as a Mizo[32]. It reflects the secular and inclusive character of Mizo society. However, when it comes to inter-community marriage such rights accrues only when the party of the marriage is a male, as such making the law gender biased.

One of the fascinating and derogatory aspect of the Act is the distortion of the concept of the penalty for the act of '*Sawn*' which literally mean 'an illegitimate child'. The Act had reduced the customary '*sawn man'* that is the price for fornication or adultery, which led to the birth of an illegitimate child only to a mere 'token' amount of Rs. 40/- (Forty only) payable by the accomplice to the woman[33]. This is a gross violation of a woman's dignity, her status and her individuality. It hits at the root of the noble attempt of the legislator for equalization of the statuses of man and woman through the Act, thereby rendering it parochial, ill conceived and deeply patriarchal. However, another discourse to the practice of '*sawn man*'is that the illegitimate child born out of such illicit relation cannot be stigmatized as illegitimate child. In the case of *Master Lalrinheta and Another* v. *Smt. Tlanghmingthangi*[34] , the Court by applying the ratio of *Revansiddapa & Anr.* v. *Mallikrjun & Ors.*[35] Held that the provisions of the Mizo Customary Laws in no certain terms does not explicitly hold that a child born out of *sawn* in any can be disqualified from inheriting the parents' property in the event where the parentage of the child could be ascertained.

The Act overall seems to be equalitarian with regard to marriage related law and the process of dissolution of marriage. However, the declaration of all forms of marriage as a void marriage, which were

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31 Id. S. 2

32 Id. S. 3 (m).

33 Id. S. 3 (w).

34 RFA No. 31 of 2009, Senior Civil Judge- 1, Aizawl District, (2012), p. 16 (India).

35 SCCR 472 (2011) (India).

not solemnized in consonance with the provisions of the Act could be detrimental to the goals it aims to achieve.

The concept of prohibited degree as per S. 8 of the Act is quite peculiar from the popularly accepted view based on consanguine relationship or affinity. The prohibited relationship, according to the provision of the Act is to be defined in the light and context of parties marriage affiliation to the rules and practices of religious denomination, not otherwise. But the process of Mizo marriage as per the definition and the process laid down in S. 3 (r) is a purely traditional customary procedure, finally solemnised by a Licensed Officer[36].

The Act had done away with all other forms of marriage like *tlandun; makpa chung khum, luhkhung* which were not necessarily social evils, but were part and parcel of the culture of Mizo society. Colloquially, they formed part of the fabric of the collective sum of the open (?) of Mizos since time immemorial. The Act seems to have introduced too much of rigidity and formality to Mizo marriage, which otherwise was inclusive and flexible.

What is profound about the Act is that it does not recognize the concept of restitution of conjugal rights. So a Mizo marriage is dissolved by competent Court either on the grounds of dissolution of marriage as per the provisions of S.13 of the Act or they are granted an alternative relief of judicial separation[37]. If the parties to the marriage fail to rescind the decree of judicial separation for a period not exceeding six months, the Court shall pronounce dissolution of marriage within sixty days[38]. With regard to permanent alimony and maintenance on dissolution of marriage the Act maintains a fine balance of the duties and liabilities of both husband and wife in economic as well as social terms towards themselves and children, if any[39].

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36 Id. S. 3 (j) provides that, " Licensed Officer means any person authorised/ permitted by any religious denomination to solemnise marriage under this Act."

37 Id. S. 14 (1) (2)

38 Id. S. 14 (3)

39 Id. S.16

***Property Right of Mizo Women under the Act*:**

The property right of Mizo women under the Act can be broadly analysed from the standpoint of two narratives: i) Mizo women right to property on dissolution of marriage by a decree of divorce; ii) Mizo women right to inheritance. However, before analysing these two narratives, it is relevant and pertinent to explore the nature and character of the property under the Act.

***Nature and Character of Property*:**

According to S. 3 of the Act a property is either movable or immovable property[40]. It can be personal property[41], acquired property[42] or ancestral property[43]. According to the act personal property means a property which is personally owned property registered in one's personal name acquired by means of purchase, gifted or inherited. Acquired property means any property other than property inherited, acquired by a person or a family. Ancestor property means a coparcenary property which can be inherited by the coparceners belonging to direct male descendants not removed more than four degrees. Thus, a Mizo person is entitled to inherit the property of his direct male ascendant not remove more than four degrees from him. However, any property inherited from maternal ascendants, how high-so-ever is not treated as an ancestral property.

***Woman's Right to property*:**

A woman's property is treated in a different class altogether. According S. 3 (x) of the Act, woman's personal property means any property owned by a woman, which is registered in her name, purchased, gifted or inherited. It also includes her dowry which she brought to her husband's house during the time of her marriage.

A) Mizo women right to property on dissolution of marriage:

Chapter VI of the Act deals with provisions for property right on the dissolution of marriage. Remarkably the Act implicitly recognizes the concept of 'matrimonial property' vide the expression the word

40 Id. S. 3 (t)
41 Id. S. 3 (u)
42 Id. S. 3 (a)
43 Id. S. 3 (b)

'property acquired' during covertures. S. 27 of the Act provides that on dissolution of marriage either by '*mak*' or '*kawngka sula mak*' the wife is entitled to a share of the acquired property or the matrimonial property a share not exceeding 50 per cent of the total acquired property. S.27 (4) of the Act provides that if the reason for the divorce was due to desertion whoever was guilty of desertion was liable to forfeit his/ her share in the 'acquired property'. Which means that if the husband was found guilty of deserting his wife for no reasonable excuse his wife is entitled to all the shares in the acquired or matrimonial property and vice- versa. Apparently, this provision is radical as well as equalitarian.

However, there is also a flip side to the progressive and egalitarian law. The provision of S. 25 of the Act provides that if a wife leaves her husband by a process of *'sumchuah'* that is she leaves her husband by returning her bride price for no reasonable excuse, except on the ground that the husband was being an adulterer or cruel or insane or impotent[44], lust (?) for her personal property, she ends up losing all her rights towards the acquired or matrimonial property.

B) Mizo Women Right to Inheritance:

Chapter VIII of the Act deals with the provisions for inheritance of a Mizo person who has died intestate. S. 31 (1) of provides that a Mizo widow automatically becomes the head of the family on the demise of her husband for the purpose of looking after the welfare of minor children. However, where the children are major she has to obtain no objection from the children on the condition that she remained chaste. Which means the widowed wife can represent the family legal, social and religious matters like the manager of the family, thereby earning the title of 'head of the family'.

*Capacity of Mizo Woman to Inherit Property***:**

According to the provisions of the Act, Mizo woman is eligible to inherit property in the capacity of widow, unmarried daughter, married daughter, youngest surviving sister as well as in the capacity of an illegitimate daughter.

I. In the capacity of a widow:

44 Id. S. 25 proviso .

Where the head of the family had died intestate the widow of the deceased in entitled to inherit a share equivalent to sons and unmarried daughters who were jointly residing with the deceased at the time of his demise[45]. In a situation where there are no children, legitimate or illegitimate of her husband at the time of his demise, she (the widow) is entitled to inherit the entire property in her capacity as the head of the family[46].

II. In the capacity of an unmarried daughter:

The word unmarried daughter connotes the dual idea: i) a daughter who is literally unmarried and; ii) a divorced daughter treated at par with an unmarried daughter for the purpose of inheritance[47]. The shares of the unmarried will fluctuate according to joint family status or the severance of the joint family status. Where the family is joint, then none of the sons living separately, an unmarried daughter who has been looking after her parents and siblings is entitled to get a share equivalent to the mother/ sons[48],with an extra share for the youngest son[49]. In the events where the joint family status had been severed and the sons living separate or *'indang'*, an unmarried daughter will be entitled to inherit an equal share as that of the surviving sons who have lived separate or *indang*[50]. In the event where the head of the family died intestate without any surviving sons, then the unmarried daughter will inherit equally with the surviving wife[51].

III. In the capacity of married daughter:

A married daughter is entitled to a right to inheritance in her deceased father's property in the event where there is no surviving son, wife or unmarried daughter[52]. And if there is more than one

45 Id. S. 31 (2) , (3), (4) and (5).
46 Id. S. 31 (6).
47 Id. S. 35, 'A divorced daughter who has returned to her father's or mother's house will be treated as unmarried daughter for the purpose of inheritance.'
48 Id. S. 31 (2) proviso.
49 Id. S. 31 (2), (3).
50 Id. S. 31 (5).
51 Id. S. 31 (4).
52 Id. S. 31 (7).

married daughter, they are to share equally[53].

IV. In the capacity of youngest sister:

It is an exceptional right bestowed on the youngest sister towards the personal property of an unmarried daughter. In an event where an unmarried daughter had died intestate while she was still a joint family member in her father's household, and she is issueless, neither father nor mother or a surviving brother to inherit, her personal property will be inherited by the surviving youngest sister[54].

V. In the capacity of youngest illegitimate daughter:

The right of the youngest illegitimate daughter to inherit is another exceptional right created by operation of law in the event of absence on any apparent heir- no surviving son, unmarried daughters, wife, married daughters or youngest illegitimate son where the head of the family had died intestate[55]. There is another narrative of illegitimate (?) of daughter, daughter who is born out of wedlock, but for whom the *sawn man* had been paid. In the absence of any other apparent heir she is entitled to the personal property of her father[56]. She is entitled to her unmarried mother's personal property who had died intestate while she was still jointly with her father's household, provided her *sawn man* was not paid[57].

Khasi Women and the Gender Perspective:

The Khasi community of Megahlaya and in the contiguous state of Assam has a distinct culture, they follow the matrilineal system. Khasi women enjoy a position of unusual dignity and importance, they have been custodians of property for generations. In this matrilineal set up lineage is derived from the mother. Among Khasis, even if marriage is illegal, void or voidable the legitimacy of the child is never questioned as maternity is above social institutions. However, adultery remains valid ground of divorce[58].Among the Khasi succession to the tribal office runs through the female line

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53 Id.
54 Id. S. 31 (10).
55 Ibid. S. 31 (9).
56 Ibid. S. 31 (10).
57 Ibid. S.31 (11).
58 supra note 24, S. 10

i.e. from the mother to the youngest daughter[59]. Even sons are the sons of their mother, while the mother belonged to her mother and so forth[60]. The aforementioned premises seem to uphold the notion that Khasi women are better placed in the societal hierarchy than their female tribal counterparts in the other North Eastern States. However, the superior position is subjected to the permissible limits of the Khasi customary laws[61].

Khasi Customary Law and the Constitution of India

In anthropology 'custom refers to the totality of socially acquired behaviour patterns which are supported and generally exhibited by members of the society'. In the current context, it is expressed as culture and traditions[62]. When it comes to law and legal system the concepts of custom and tribe seem to be together. Tribe is a group of families who have a feeling of community through occupying a territory and following similar customs. Tribe and tribal are convenient terms for indicating that a person still follow custom, rather than law[63]. Because of the distinct culture and outlook on life of the tribal people the Constitution of India vide Art. 244 and 244 A, recognizes the necessity of separate political and administrative structures for the tribal people[64]. Also Para 3 sub para 1 of the Sixth Schedule mandates that in the tribal areas the autonomous district with the help of the concerned district councils and regional councils have the power to make laws with respect to marriage and divorce[65]; and social customs[66].It is a law to protect tribal people against exploitation and exposure to laws that are not suitable to them.

Analysis of Khasi Marriage and Divorce Laws

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59 2 KUSUM & P.M. BAKSHI, MARY LACUSTOW AND JUSTICE IN THE TRIBAL AREAS OF MEGHALAYA, 5 (ILI, Silver Jubilee Publication 1982).

60 Ibid.

61 Khasi women may inherit property but the office and the management of property is in the hands of the maternal uncle or other male relatives.

62 STANLEY WILK, "CUSTOM" (Ecyclopaedia of Anthropology 113, 1976).

63 27 ELIZABETH E. BACON, "TRIBE" (Encyclopaedia Americana 98 1969) also Id, 63.

64 Id. p. 7

65 Supra note 5, Sixth Schedule para 3, 1 (i).

66 id. para 3, 1 (j)

Marriage among Khasis are usually monogamous, but according to their customary practice, a man may also keep a second wife by making an informal alliance with another woman. In such case the first wife is treated as the real wife, i.e the *katnga trai,* and the second wife as the stolen wife i.e *ka tnga trait uh*[67]. Among the Khasis marriage within the community is tabooed. According to their customs if a person marries within the clan the person will lose the right to inherit property, ostracized from society and in extreme case no right of burial on death with another family member. However, these norms seems to be have been exploited by the non – khasi men. There numerous instances of non- khasi male marrying the youngest khasi daughter only for the purpose of acquiring her property or to open a business in their wife's name to avoid paying taxes[68]. Cross cultural marriage between a Khasi woman and a migrant male is not uncommon, however such marriages are treated with suspicion and looked down upon by the Khasi male.It had even led to communal unrest[69].

Impact of Christianity on Khasi Marriage and Divorce Laws Law:

Khasi Christian community by virtue of S.3 of the United Khasi Jaintia Hills District (Christian Marriage) Act, 1954[70] in matters pertaining to marriage and the solemnisation of marriage are governed by all the provisions of the Christian Marriage Act, 1872. The Act extends to the whole of the United Khasi- Jaintia Hills District[71]. The proceedings of Khasi Christian Marriage have deep influence of the Western culture and innovation of Khasi Christians. Marriage is solemnised in the Church by the officiating minister,

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67 supra note 59, at 88.

68 Simanterik Dowreh, Married In Meghalaya: Feminist Dream For The Iron Fist Of Matriarchy? FIRST POST Aug.12, 2016 (Jul. 30, 2017, 09:00 P.M.) http://www.firstpost.com/specials.

69 Dinesh Wagle, Meghalaya, India: Marriage is not a Private Affair, WAGLE STREET JOURNAL (Jul. 30, 2017, 09:10 P.M.) https://blog.com.np/2010/07/05.

70 In pursuance to the provisions of Para 11 read with Para 3 (1) of the Sixth Schedule of the Constitution the United Khasi- Jaintia Hills District Council is empowered to make laws, rules and regulations pertaining to marriage, divorce, social customs etc shall be published in the Official Gazette of the State Government to have the force of law.

71 S. 1 (ii), The United Khasi- Jaintia Hills District (Chritian Marriage) Act, 1954.

who is usually the Pastor of the Church[72]. Whereas traditional Khasi marriage is performed at the bride's place mediated by mediators or *ksiangs* from each side[73]. For parties who are married as per the Khasi Christian Marriage Act, registration of marriage is compulsory. But for parties who are married as per Khasi customary law, it is not compulsory that such marriages are registered. In most of the cases they are unregistered. As co-habitation is an accepted practice in the Khasi social milieu, in a situation where the man simply deserts the woman, the Khasi woman and child or children end up being most vulnerable[74]. And since the union or the marriage was not registered the wife or woman cannot approach the court for maintenance[75].

Divorce among the non- Christian Khasis is least formal.It is extra- judicially permissible and there is no stigma attached to it[76]. They take resort to a customary divorce through the simple ritual of throwing cowries or copper in the air. On completion of this ritual they are mutually separated with no personal obligation to one another[77]. Among Christian Khasis marriage is perceived as an institution sanctioned by God, approved by the society and legalized by the law of the land[78]. The grounds of divorce for Christian Khasi are governed by the provisions of the Indian Divorce Act, 1869. In the case of Miliancy Foster Blah v. Ka Margaret Rose Thangkiew[79], the Gauhati High Court held that the dissolution of marriage of the parties under the Christian Marriage Act has to be sought as per the provisions of S. 17 of the Indian Divorce Act.

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72 POHSNAP, LEADERWELL, TRUMPETS FOR THE KHASI: EVALUATING THE INDEGENITY OF THE CHURCH OF GOD AMONG THE KHASIS, 200, Dissertation, Doctor of Missiology, Faculty of the E. Stanley Jones School of World Mission and Eavngelism, Asbury Theological Seminary, Kentucky, 1988 (Jul. 30, 2017, 09:20 P.M.), https://place.asburyseminary.edu/cgi/viewcontent/.

73 Id. at 201.

74 KHADC for a Stringent Khasi Marriage Act, THE SHILLONG TIMES Feb. 23, 2012 ((Jul. 30, 2017, 09:30 P.M.)), http://www.theshillongtimes.com/2012/02/23/.

75 Id.

76 KUSUM supra note 59, at 88.

77 id. p. 203

78 id. p. 202

79 Civil Revn. No. 29 (SH) of 1991, Gauhati High Court (India)

In Ka Amal Lyngdoh v. U. Jabin Pakem[80] confirmation of decree nisi of the dissolution of marriage granted by the Judge, District Court, Jaintia Hills Autonomous District Council, Jowai was petitioned at the Gauhati High Court. The petitioner had sued the respondent for dissolution of marriage on the grounds of desertion and cruelty. The parties being Christian for the confirmation of the decree nisi the court were required to satisfy whether desertion and cruelty constituted valid grounds for dissolution of marriage as per the provisions of S.10 of the India Divorce Act, 1869 in instances where the wife had petitioned for dissolution. Since neither the grounds of cruelty nor desertion could be an independent ground for dissolution of marriage to wife unless coupled with adultery the Court was unable to the decree nisi for dissolution of marriage.

Conclusion:

The Mizo society is no doubt one of the most progressive societies in the North Eastern states of India.However, it is found that the gender discourse within the society of Mizoram is majorly based on the patriarchal narratives of social-economic and political (?). The participation of women in the political institution, though encouraging is skewed. On the one hand women voters out-beat male voters, but when it comes to having elected law making legislators and participate in decision it has an abysmal performance of only 10 percent. It is felt that in a Mizo society which is otherwise liberal the contrast of liberal and conservative approach of the political participation of women against male have to be reconstructed through media, education and social and economic interactions which are at par with the contemporary world view.

In the context of decision making in the family the personal law affairs of marriage, divorce, maintenance the Mizo woman had made a giant leap with enactment of the Mizo Marriage, Divorce and Inheritance of Property Act, 2014. The Act is the outcome of the relentless protracted effort of Mizo women pressure groups for the past 41 year. It has for the first time formalized the process of Mizo (marriage?) and tried to bring about the equalisation of the statuses of man and woman in marriage, during marriage and on the dissolution of marriage. However, the abject rejection of all other customary forms of marriage other than the one prescribed

80 Divorce Suit Nos. 31 (SH) and 47 of 1986, Gauhati High Court (India)

by the Act had distorted the purity the fabric of the peculiar and unique cultural life Mizo society in the quest for equalization. The retaining of the *sawn man* to a mere token of Rs. 40/- hits the core of dignity and individuality of a Mizo woman. The issue of the bride price also remains contentious.

With regard to women's rights to property the Act had introduced the concept of matrimonial property implicitly, which is a stupendous achievement since the woman in divorce can be entitled to 50 per cent of their acquired property during covertures and on the exceptional grounds of adultery of the husband she is entitled to take the entire property. However, with regard to inheritance right male child or male (?) or husband is preferred over the female counterparts. The jurisprudential basis for the creation of rights and narratives of rights for woman and man in the process of equalization of status seems to be lacking contemporary sound jurisprudential basis.

Khasi women on the other hand, are more empowered than their Mizo counterpart owing to the prevalence of the matrilineal system. The narrative of marriage rights, duties and obligation in marriage, during and on dissolution is exact opposite among Khasi women. As such there is no concept of stigma of divorce, widowhood or illegitimate child as long as the parties to the marriage are governed by the Khasi customary laws. However, the over simplicity of marriage and dissolution of marriage in the absence of the compulsory registration is also counterproductive for Khasi women and children as the male may casually walk out of the union without any accountability whatsoever.

Khasi Christian marriage is a semblance of the innovation of the Khasi Christian and the western style of marriage solemnised by the local priest. The institution of marriage is more stable among the Khasi Christians since it is governed by the provisions of the Indian Christian Marriage Act, 1872. However, when it comes to dissolution of marriage Khasi women is at a disadvantage as the grounds for divorce had to be in compliance with the Indian Divorce Act, 1869 which more or less cater to the male or is male centric.

TO COMPETE OR NON-COMPETE: THE EVOLUTION OF THE INDIAN POSITION ON NON-COMPETE AGREEMENTS IN COMBINATIONS

By

Abhishek DharKarmakar

1. Introduction

Non-compete clauses are clauses in the purchase or sale agreements which restrict the seller of a business from competing with the buyer in the future, and can be considered to be almost ubiquitous in M&A transactions. From a competition law perspective, these obligations are at times necessary to facilitate effective combinations. Purchasers use these to protect themselves from competition from sellers and to extract the maximum benefits from the transferred assets. Non-compete clauses are especially necessary and common in Joint Venture (JV) agreements, where these obligations prevent partners to the JV from competing against each other, which would defeat the whole purpose of a Joint Venture.

While there are clearly many advantages to having non-compete clauses in combinations, there are disadvantages as well. From the standpoint of competing regulatory bodies, non-compete clauses must not cross the fine line into causing adverse effects on the landscape of competition in the market. Most major competition law frameworks around the world are of the opinion that the duration, subject matter and persons subject to non-compete clauses should not go above and beyond what is reasonably necessary to achieve the legitimate objective of implementing the transaction.[1]

In view of the above, the Competition Commission of India (CCI) on July 4, 2017 released a Guidance Note titled 'Guidance on Non-Compete Restrictions', intending to throw some light on the legal position of non-compete clauses in combinations under the

1 C. Thomas and G. Stefano, Non-compete clauses in M&A transactions: the EU Telefonica/Portugal Telecom judgments and some bestpractices, Kluwer Competition Law Blog, available at http://kluwercompetitionlawblog.com/2016/07/07/non-compete-clauses-ma-transactions-eu-telefonicaportugal-telecom-judgments-best-practices/ , last seen on 29/07/2017.

Competition Act of 2002.[2] Prior to the release of this guidance note, the legal position of non-compete clauses in combinations had not been clearly defined, much to the dismay of enterprises. The only sources of clarity were a few orders of the CCI which had examined and relied on non-compete clauses, but were incomplete and not exhaustive. This step of the CCI is in line with international best practices.[3]

This research paper shall attempt to examine the latest legal position of non-compete clauses in combinations in India, by tracing its development through cases decided by the CCI over the years, and also by comparing the Indian scenario with that of the European Union.

2. CCI's jurisprudence

Prior to the publication of the Note on 'Guidance on Non-Compete Restrictions' by the Competition Commission of India, the legal position of non-compete restrictions in competition law had been established primarily by numerous Orders of the CCI that approved certain combinations, which had a non-compete restrictions in them that were analyzed by the CCI.

Some of the leading cases are outlined below.

2.1 Orchid Chemicals and Hospira Healthcare:

The CCI, for the first time cleared its stance on the validity of non-compete clauses in its order regarding the combination of Orchid Chemicals and Hospira Healthcare. The participants in the combination were Orchid Chemicals and Pharmaceutical Limited (a listed Indian public limited company)and Hospira Healthcare India Private Limited (a private limited company). They had entered into a business transfer agreement (BTA), in which the non-compete clause was not approved by the CCI.[4] The non-compete clause

2 CCI Issues Guidance Note on Non-Compete Restrictions, COMPAD, available at http://www.compad.in/cci-issues-guidance-note-on-non-compete-restrictions/ , last seen on 29/07/2017

3 Supra 2.

4 Orchid Chemicals and Pharmaceuticals Limited and Hospira Healthcare India Private Limited, Combination Registration No. C-2012/09/79 (Competition Commission of India, 21/12/2012).

in question prevented Orchid Chemicals and its promoter from indulging themselves in business activities related to the transferred business for periods of 8 years and 5 years respectively.[5] The CCI's stance was multi-faceted. The CCI did not refute the assertion that a non-compete clause is essential for ensuring full value of the asset to the acquirer, but added that the clause in question has to be 'necessary' and 'reasonable' with regards to the duration over which such restraint is enforceable, and the business activities, geographical areas and the person(s) subject to such restraint, so as to ensure that such obligations do not result in an appreciable adverse affect on competition.[6]

Following this line of reasoning,CCI asked the parties to justify the non-compete clauses of the deal, and in consequence, the parties offered to modify the terms, cutting back on the duration of the non-compete for four years, and also excluding a few business activities from its ambit. The CCI accepted the modifications and approved the combination in its entirety.[7]

2.2 Mylan Inc. and Strides Acrolab Limited

In this particular combination, MylanInc entered into a Sale and Purchase agreement with Strides Acrolab Limited and its promoter entities Arun Kumar and Pronomz Ventures LLP. The agreement was for acquiring the entire issued and outstanding share capital of Agila Specialties Private Limited (a subsidiary of Strides Acrolab)[8].

The parties had entered into a Restrictive Covenant Agreement (RCA) which provided that for a period of six years after the proposed combination,Strides Acrolab Limited, its Promoters or its subsidiaries would not "carry on or be engaged, concerned or interested economically or otherwise in any manner in the business of developing, manufacturing, distributing, marketing or selling

5 Ibid.

6 Ibid.

7 Orchid Chemicals gets CCI nod for Hospira deal, Business Today, available athttp://www.businesstoday.in/current/deals/orchid-chemicals-gets-cci-nod-for-hospira-deal/story/191003.html, last seen on 29/07/2017.

8 Mylan, Strides Arcolab Limited, Arun Kumar and Pronomz Ventures LLP, Combination Registration No. C-2013/04/116 (Competition Commission of India, 20/06/2013).

any injectable, parenteral, ophthalmic or oncology pharmaceutical products for human use, anywhere in the world."[9]

The CCI observed that this non-compete covenant covered products not being made, sold or developed by Agila Specialties Private Limited and that the duration of the restriction was unjustified. It instead asserted that the non-compete covenant "should cover only those products which are either being presently manufactured/ sold or are under development, by the Target Enterprises".[10] Here too, the parties reduced the duration of the RCA to four years and also modified the agreement by changing the products covered under it, as per the CCI's observations.[11]

Even with the above Orders of the CCI, there was no way for the parties proposing to enter into a combination to know whether a non-compete clause would be approved with it or not. This is due to the fact that the jurisprudence developed by the CCI through these cases only clarified the position of non-compete restrictions in certain circumstances. Considering this fact, to fill the gap and eliminate uncertainty, a comprehensive set of clarifications was needed.

3. CCI's Guidance Note on Non-Compete Restrictions

The CCI, having noted that the parties to a combination often enter into non-compete restrictions, and that these restrictions may adversely impact competition landscape issued a Guidance Note on non-compete restrictions, in line with international best practices.[12]

The CCI also added that the Guidance Note is to be used as a tool for drafting non-compete restrictions, and is thus not binding on the parties to a proposed combination.[13] Even then, the standards enshrined in the Guidance Note are not to be applied in a mechanical fashion, and that the Commission would consider the specific circumstances of each case.[14]

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9 Ibid.

10 Ibid.

11 Ibid.

12 Introductory para on Non-compete, Competition Commission of India, available at http://cci.gov.in/sites/default/files/Non-Compete/Introductory_%20para_on_Non-compete.pdf, last seen on 29/07/2017.

13 Ibid.

14 Guidance on Non-Compete Restrictions, Competition Commission of India, available at http://cci.gov.in/sites/default/files/Non-Compete/Guidance_

The Guidance Note also clarified that for a combination to cover non-compete restrictions, the restrictions would have to be directly related and necessary to the implementation of the combination.[15] Whether they satisfythe above conditions depends on whether the Note's general principles are followed or not.[16]If the principles are not followed, then the CCI would state that the non-compete is not ancillary, but that will not be prejudicial to the legal status of the combination.[17]

General Principles:

3.1. Direct relation and necessity:

The non-compete restriction needs to be directly related to the combination. This means that it should be economically related to the combination, and must have the intention of allowing a smooth transition to the scenario after the combination. It must also be closely linked and connected to the combination, but ancillary or subordinate to its main object.[18]Also, the non-compete must be necessary. This means that if the non-compete restraint were not present,to implement the combination would become impossible, or it could only be implemented in more uncertain conditions. Further, if the combination could only be implemented at a substantially higher cost, or over an appreciably longer period or with considerably higher difficulty if the non-compete restriction is absent, then it will qualify for necessity.[19]

3.2 Reasonable requirement:

The Guidance note states that if equally effective alternatives are available to the parties for attaining the same objective that the non-compete restriction is attempting to accomplish, the parties must choose the alternative which restricts competition the least. Therefore, parties to a combination must ensure that the non-com-

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Note.pdf, last seen on 29/07/2017.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

pete restriction should not exceed what is reasonably required.[20]

3.3 Duration:

According to the Guidance note, the duration of the validity of a non-compete clause will be justified for a period of upto 2 years if only the transfer of goodwill is involved, and upto 3 years if both goodwill and know-how are included in the transfer.[21]

If parties wish to justify longer durations, they will have to show the existence of a limited range of circumstances which are specified in the Note. These include circumstances where in certain industries and sectors, customer loyalty to a seller persists longer durations or where the nature of the know-how transferred justifies the longer duration.[22]

However, the duration requirement for joint ventures is different. The standing period of the joint venture can normally be the duration of the restriction. The Guidance note provides that even this can be extended in specific circumstances.[23] What these specific circumstances will be are not clearly stated.

3.4 Geographical field:

The Note provides that the geographical field of a non-compete clause in an acquisition must not exceed the area in which products and services were offered by the seller, before the transfer took place. Other territories where the seller had not previously operated will not allow protection to the acquirer.[24]

If the seller had already planned to enter into an area at the time of the transaction, and has invested in the move, the protection from competition may be extended to those territories as well.[25]

In case of joint ventures, the geographical field will be limited to the area where the parent enterprises were operating or planning to enter and had invested in before the joint venture was made. The

20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid.
24 Ibid.
25 Ibid.

scope of the non-compete clauses in joint ventures entering a new market can be further extended to the products, services and territories operated in the new market.[26]

3.5 Restriction on products and services:

The Note restricts the scope of the products and services to those which comprise the main activity of the transferred business/enterprise or the joint venture. This includes improved versions, updates, and successor models of products along with products and services at advanced stages of development, and fully developed but unmarked products.[27]

3.6. Binding nature of non-compete obligations:

A non-compete cannot bind anyone other than the seller, its subsidiaries and agents. Thus, resellers cannot be bound by the non-compete obligations. It can also be imposed on controlling shareholders of an enterprise.[28]

3.7 Seller's right to purchase or hold shares:

Limiting a seller's right to purchase or hold shares in a competing enterprise is allowed, but it will not be allowed for an acquisition made only for the purposes of investment.[29]

4. Comparison with the European Competition Law Regime

The competition law regime in the European Union has dealt with the issue of non-compete restrictions long before the Indian competition law regime caught up to it. The European Commission has a document called the Commission Notice on Restrictions Directly Related and Necessary to the Concentrations in the EU. which is also known as the EU Commission Notice.[30]

This particular document clarifies "ancillary restraints", which are

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26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.
30 Commission Notice on restrictions directly related and necessary to concentrations, Access to European Union Law, available at http://eur-lex.europa.eu/legal content/EN/TXT/HTML/?uri=CELEX:52005XC0305(02)&from=EN, last seen on 29/07/2017.

contractual agreements which companies frequently enter into in the context of mergers and include non-competition clauses, license agreements, or purchase and supply obligations.[31]

The CCI's Guidance Note can be considered the narrower Indian equivalent of the EU Commission Notice, as a bare reading of the EU Commission Notice reveals that the CCI has taken a leaf out of the international best practices implemented by the European Commission.[32]

Paragraphs 18 to 26 of the EU Commission Notice elucidate the Commission's view of non-competition clauses, paragraphs 36 to 41 expands that clarification to joint ventures.[33] If one compares the CCI's document with the European Commission's, one would undoubtedly arrive at the conclusion that the CCI has been heavily influenced by the principles of the EU Commission Notice.

However, the EU notice covers all ancillary restraints, while the CCI's guidance note covers only one type of ancillary restraint, i.e. non-compete restrictions.[34]

The EU Commission Notice also states that if an arrangement or agreement is not considered to be ancillary to a concentration (which is the European Commission's equivalent of a combination), it will not prejudice the concentration's legal status.[35]Likewise, paragraph 3 of the CCI Guidance Note clarifies that if a non-compete restriction is found to be not ancillary to a combination, it will not be prejudicial to the legal status of the said combination.[36]

5. Conclusion

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31 The Commission changes its policy on “ancillary restraints”, European Commission Press Release Database, available at http://europa.eu/rapid/press-release_IP-01-908_en.htm?locale=en, last seen on 29/07/2017.

32 R. Goel, Non-Compete Clauses: CCI Issues Guidance Note, Competition Law A Cyril AmarchandMangaldas Blog, available at http://competition.cyrilamarchandblogs.com/2017/07/non-compete-clauses-cci-issues-guidance note/#_, last seen on 29/07/2017.

33 Supra 30.

34 Supra 14.

35 Supra 30.

36 Supra 14.

Finally, after a long wait, the Competition Commission of India has finally come up with a document that shall clarify numerous uncertain parameters that had plagued drafters of non-compete clauses over the years. It is also commendable that the CCI took inspiration from the EU Commission Notice on this matter, as the international best practices that have been enshrined in that particular document have stood the test of time, and have thus proven to be effective.

But some questions still remain. The EU Commission Notice does not provide for the assessment of individual ancillary restraints, which, of course, include non-compete clauses. This means that parties must self-assess their non-compete restrictions and ensure that they are compatible with European Union law. In contrast, the CCI's Guidance Note does not explicitly state whether it will continue assessing the validity of individual non-compete restrictions. All that the Guidance Note states in this regard is that the CCI consider the specific circumstances of each case.

Additionally, it remains to be seen whether the CCI will, in the future, include other types of the ancillary restraints such as confidentiality clauses inside the purview of the Guidance Note.

UNWANTED EVERYWHERE- The Rohingya's Struggle For Asylum In India

It is difficult for anyone who has never been forcibly displaced to imagine what it is like to be a refugee.

— Kofi Annan

ABSTRACT

Despite having ancient origins in the Rakhine State of Western Myanmar, the Rohingyas were rendered stateless with the passage of discriminatory 1982 citizenship law and has been subjected to persistent state sponsored process of persecution for decades, almost driving them out of Burma. This note underlines the ramifications of the ongoing identity crisis endured by the community in the process of seeking asylum in India, while highlighting the challenges and advocating the need for clarity in terms of placing the refugees on a different forum from that of foreigners within our existing legal framework.

KEYWORDS: Rohingya, asylum, Myanmar, stateless

INTRODUCTION

"We want to be one of you." Tucked inside a bustling working class locality in Delhi, is a printing store managed by a 29 year old, Maung Abdul Khan, a Rohingya refugee in India since 2013. This year in January, Khan set up the 'Rohingya Literacy Mission' with his friends, a significant step towards improvement of the lives of individuals in his community.

Repressed and persecuted for decades along ethnic-religious lines, wilfully neglected by the government and expunged from the national discourse, in many ways, explains the plight of Rohingyas**,**[1] a minority Muslim community fromMyanmar, who have been stripped of citizenship and rendered stateless in their native soil, leading to forced migration and search for asylum in neighbouring countries.

1 Introduction, in ROHINGYAS: THE EMERGENCE OF A STATELESS COMMUNITY 39 (S. Basu Ray Chaudhary & R. Samaddar eds., 2015)

The Rohingya[2] represent the Islamic minority of a Buddhist dominated Myanmar that refuses to validatethe unique identity of these people, despite the community constituting around one third of the total population in Northern Rakhine state.[3] The Burmans (mostly Buddhists who make up for 68% of the total population of Myanmar)[4] together with political, religious and cultural authorities have, invariably, recognized these Muslims of Arakan as illegal immigrants from Bengal who migrated to the Rakhine state during and after the British Colonial era.[5] However, the issue regarding origin of the ethnic group has been debatable since time immemorial, as most experts outside Myanmar refute the claims of Burmese government and Burmese historians about Rohingya Muslims being recent immigrants from Bangladesh. They state that the history of the Myanmar's Rohingya people can be traced back to the early 7th century[6] AD when Arab Muslim traders settled in northern Rakhine state of Western Myanmar (formerly known as Arakan state) and established a distinct culture and civilization of their own. Nonetheless, the disputed status with respect to their origin has compelled them to live as unsolicited visitors till date, having very limited access to resources and systematically robbed of all the basic entitlements necessary to lead a dignified life. They have been persistently subjected to grave human rights violations with institutionalized socio-political exclusion, militarization and

2 There has been a serious dispute regarding usage of the term "Rohingya". See, Aye Chan, The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar), 3 SOAS BULLETIN OF BURMA RESEARCH 396, 397 (2005), https://www.soas.ac.uk/sbbr/editions/file64388.pdf (last updated June 4,2017).

3 Human Rights Watch, Burma: Aid Blocked to Rakhine State, Oct.21, 2016, https://www.hrw.org/news/2016/10/21/burma-aid-blocked-rakhine-state (last updated June 4, 2017)

4 South Eastern Region Migrant Resource Centre, People of Burma in Melbourne: A Community Profile, 9 (May 2011), http://www.smrc.org.au/sites/default/files/People%20of%20Burma%20in%20Melbourne%20-%20final%20version.pdf (last updated June 5, 2017).

5 Leona Elisabeth Wirtz, Nation-Building in Myanmar - the Exclusion of a Minority Group, http://projekter.aau.dk/projekter/files/77944770/Master_Thesis_DIR_Leona_Wirtz.pdf (last updated June 5, 2017).

6 Syeda Naushin Parnini, Mohammad Redzuan Othman and Amer Saifude Ghazali, A Research Note on the Rohingya Refugee Crisis and Bangladesh-Myanmar Relations, 22(1) ASIAN AND PACIFIC MIGRATION J. 133, 135(2013).

ethnic cleansing resulting in forced displacement and migration to the neighbouring countries, in search of asylum/refuge. Often, this impels them to undertake treacherous sea voyages at the mercy of the traffickers with inadequate means of transportation, leading to dire consequences.

However, such a state induced violence along the ethnic-religious lines resulting in widespread persecution has been facilitated by an entire framework of prejudiced policies and laws that has contributed to complicating their living conditions. The government has played a significant role in the oppression of these Muslims by enacting the 1982 Burmese Citizenship Law, which excludes the communityfrom the three tiers of citizenship created by the same, namely: citizenship, associate citizenship and naturalized citizenship.

THE 1982 LAW - EMERGENCEOF STATELESS ROHINGYAS

The government of Myanmar has been subjected to heavy international criticism for blatantly refuting allegations of ethnic cleansing and genocide being undertaken against Rohingya Muslims, since they are not considered to be an ethnic group.[7]

The promulgation of 1982 Burma Citizenship Law has been pivotal to the widespread persecution of the Rohingya, who are not considered to be one amongst the eight recognized "indigenous races" and denied full citizenship.8 It is important to note that the inclusion of these indigenous races within the purview of citizenship and how they would be referred to has been determined by the state in exercise of its absolute discretion.9 Such an exclusion of Rohingya from the list of eight broadnational races broken down into 135

7 Mr. Win Myaing, the official spokesperson of the Rakhine State Government, May 15, 2013.

8 Burmese Rohingya Organisation UK, A Briefing on Myanmar's 1982 Citizenship Law and Rohingya, 2014, http://burmacampaign.org.uk/media/Myanmar%E2%80%99s-1982-Citizenship-Law-and-Rohingya.pdf (last updated June 10, 2017).

9 Dr. Mohammad Yunus, A History of Arakan: Past and Present, 1994, http://www.netipr.org/policy/downloads/19940101-Dr-Yunus-History-Of-Arakan.pdf (last updated June 10, 2017).

ethnic groups10 legitimises and sanctions the restrictive state policies imposed against the community. Such policies are designed to make their life so intolerable that they will be left with no other alternative but to leave the country. Further, such a calculated move towards denying Rohingya their right to be a citizen of Burmahas instilled, amongst other citizens of Myanmar, a sense of hostility and estrangement towards thecommunity who do not belong to Myanmarand promotes discrimination towards them. The law is outright discriminatory and relies on notions about race and ethnicity, prevalent during colonialism in Burma and whichhas now become redundant.11

Further, the stipulations of the impugned law with regards to acquiring naturalizedcitizenship are so stringent that it categorically overrides the scope of even acquiringnationality through the process of naturalized citizenship.12They, on most of the occasions,have been unable to put forth "conclusive evidence" of their ancestry or history of inhabitancy and are therefore termed as ineligible for any tier of citizenship.13However, such an arbitrary deprivation of citizenship contravenes their right to nationality guaranteed by Universal Declaration of Human Rights [15(1) and 15(2)] and also enumeratedby other human rights treaties and conventions, including, International Covenant on Civil and Political Rights, 1966 [Article 24 (3)], UN Convention on the Elimination of All Forms of Racial Discrimination, 1965 [Article 5 (d) (iii)], UN Convention on the Elimination of All Forms of Discrimination against Women, 1979 Article 9, UN Convention on the Rights of the Child, 1989[Article 7 (1)].

Under these circumstances, the Rohingyas cannot be acknowledged

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10 Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23(3) PACIFIC RIM LAW & POLICY J. 683, 691 (2014).

11 Md. Mahbubul Haque, *1982 Citizenship Law in Burma and the Arbitrary Deprivation of Rohingyas' Nationality*, 35(2) SOUTH ASIAN J. OF POLICY & GOVERNANCE 23, 24 (2014).

12 The enactment of 1982 Burma Citizenship Law witnessed issuance of a colour coded Citizenship Scrutiny card consistent with his/her category of citizenship, namely: citizenship, associate citizenship, and naturalized citizenship.

13 A. A. Ullah, Rohingya Refugees to Bangladesh: Historical Exclusions and Contemporary Marginalization, 9(2) J. OF IMMIGRANT & REFUGEE STUDIES 139, 149 (2011).

as nationals of their native state within the scope of International Law and such ostracism has compelled them to stay completely outside of the legal framework, without any protection of their civil rights and liberties.14

Several UN bodies has raised this issue of Rohingya Muslims not receiving acknowledgment as one of the country's national ethnic group since the country became independent in 1947. Further the UN High Commissioner for Refugees commented that the community has been out casted amongst the nation's other linguistic, religious and ethnic minority through systemic exclusion from all the three tiers of citizenship, introduced by the 1982 Citizenship Law.

Nonetheless, the enactment of the 1982 Citizenship law has been the culmination of state backed practices and actions that imposed systemic restraint on their right to a dignified livelihood which has made their conditions deplorable.15 The law has been the root cause of all other plights of Rohingya in Myanmar. They have been subjected to the following abuses16:

Compelled to reside in camps and ghettos,

Restraint in access to viable livelihood opportunities such as education and healthcare due to strict restrictions on their movement,

Ousted from government posts, employments etc.,

Prohibition of marriage without permissions from the state. However, the same which is granted,

Arbitrary confiscation of property and land,

Forced labour without any payment of wages and,

Restraint on their family life and also on the number of children they can have.

Their deplorable living conditions have further worsened with the Government of Myanmar imposing severe restrictions on the hu-

14 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS, 1954 at art.1.

15 Chris Lewa, North Arakan: An Open Prison for the Rohingya in Burma, 32 FORCED MIGRATION REVIEW 11, 12 (2009).

16 Id.

manitarian assistance provided to the community by the International aid organizations to the extent that they are only allowed to serve Rohingyawho reside in the Internal Displacement Camps. Hence a majority of this community residing in unorganized camps or ghettos cannot secure any charitable aid.17 Even, access to the IDP camps around Sittwe remains strictly regulated preventing timely and adequate assistance delivery.18

Therefore it is imperative that the government address the issue of statelessness and also recognize the humanitarian needs of the community particularly residing in squalid camps and accordingly allow safe and unimpeded access for international organizations to the population in need.

NOWHERE TO RUN – A GRIPPING ACCOUNT OF ROHINGYA MIGRATION TO INDIA

India's stature as a safe haven for people fleeing persecution in many of its sub-continental neighbours19 is characterized by her distinct geography, secular democratic polity and multi-ethnic society.20Being a nation,that has displayed immense generosity in its treatment to people across borders and is equally vicinal to the neighbouring nations, either by foot or by sea, India has had a long practice of sheltering asylum seekersand refugees, since time immemorial, particularly from South Asian region.21

Despite having generously accommodated a constant inflow of forcedmigrants through its porous borders,22 the nation has been reluctant to accede to the 1951 Refugee Convention or its 1967 Protocol or has displayed little interest in drafting a national legis-

17 Id. at 3.

18 Id.

19 ARJUN NAIR, National Refugee Law for India: Benefits and Roadblocks, in THE INSTITUTE OF PEACE AND CONFLICT STUDIES RESEARCH PAPERS 1 (IPCS ed., 2007).

20 RAGINI TRAKROO ZUTSHI, JAYSHREE SATPUTE & MD. SAOOD TAHIR, REFUGEES AND THE LAW 55 (2'nd ed. 2011).

21 V. Suryanarayan, Need for National Refugee Law, INDIAN SOC'Y INT'L L.Y.B. INT'L HUMANITARIAN & REFUGEE L. 15, (2001).

22 Bhairav Acharya, The Law, Policy and Practice of Refugee Protection in India, 1 (2004), https://notacoda.files.wordpress.com/2014/08/acharya-the-law-policy-and-practice-of-refugee-protection-in-india.pdf (last updated July 20, 2017).

lation governing the protection of refugees.23 Further, in absence of any consolidated legal regime, these refugees are confronted by a legal vacuum24 due to which their status and the nature of entitlements to be exercised by them remain obscure. The present arrangement of administering the refugee influxes through an ad-hoc system of executive action guided by India's bilateral policies with the country of origin25 and free from legal accountability confers wide powers to the Centre to act with unfettered discretion with respect to the forced migrants and asylum.26 Therefore, reluctance and disinclination to join the evolving international refugee order or create a territorial asylum framework of its own to address the refugees, in itself, reveals the intent of the executive to only gratify political interests and considerations.27 This, in turn, has led to a series of anomalous situations, wherein selected groups28 are conferred with certain rights and privileges disputing the scope of equality and consistency in the treatment meted out to the refugees at large.29

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23 Thavamani Johnson Sampathkumar, The Pattern of Refugee Management for Ensuring Their Rights: The Indian Approach, 3(6) INTERNATIONAL RELATIONS AND DIPLOMACY 433, 435 (2015). See also, Country Operations Plan for India, United Nations High Commissioner for Refugees, 1 (2006), http://www.unhcr.org/uk/4332c6232.pdf (last updated July 18, 2017).

24 Joseph Xavier and Apoorva Sharma, Legal Rights of Refugees in India, 2015, https://www.jrs.net/assets/Publications/File/Legal%20Rights%20of%20Refugees%20in%20India.pdf (last updated July 20, 2017).

25 NAIR, supra note 19 at 4.

26 Nafees Ahmad, The Constitution-Based Approach of Indian Judiciary to the Refugee Rights and Global Standards of the UN Convention, 8(1) THE KING'S STUDENT L. REV. 30, 43 (2017). See also, Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367.

27 Bhairav Acharya, The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals, 9 NUJS L.REV. 173, 184 (2016).

28 The Tibetan and Srilankan refugees have been issued refugee identity documents and are also entitled to assistance from the government. The Tibetan community were granted land to set up educational institutions, offered medical facilities and food supplies, travel permits and privileges usually not provided to other refugee groups. They were also granted the permission to set up a government-in-exile. As regards to the Srilankan refugees they were encouraged to enter India until the assassination of Rajiv Gandhi in 199. Although, they are still encouraged, however they are settled in camps with limited allowance from the government and their movements are closely monitored.

29 Veerabhadran Vijayakumar, A Critical Analysis of Refugee Protection in South

The Rohingya asylum seekers in India is one such group along with Somalis and Palestinian refugees who are left at the goodwill and empathy of the government and its improvised policies alongside limited subsistence allowance from UNHCR India. Such a practise has resulted in genuine refugees suffering immensely in a country that otherwise boasts of a stirring historical account of protecting refugees.

LEGAL STATUS IN INDIA

In absence of any specific provision that would distinguish refugees from foreigners,30 the practice of the Indian Government with regards to dealing with refugees have been three-fold:

Refugees in cases of large influx stay in camps and accorded temporary shelter and assistance by the state including facilities of education, healthcare, employment etc.31

Asylum seekers from other countries not recognized by the government submit an application to the office of United Nations High Commissioner for Refugees (UNHCR) for grant of individual refugee status which is accorded after detailed scrutiny, in consonance with the provisions stated in the UNHCR Statute and the Refugee Convention.32

Natives of the other countries who reached India and have gradually managed to integrate with the local community, neither recog-

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Asia, 19(2) REFUGE 6, 12 (2001).

30 THE FOREIGNERS ACT, 1946 at section 2(a) ("Foreigner" means a person who is not a citizen of India ;"); See also, Statement of Objects and Reasons of the Foreigners Act, 1946, it's an ancient legislation enacted by the colonial government, whose continued enforcement even after seventy years of independence indicates the will of the government to exercise absolute power while dealing with foreigners in India.

31 A large influx of refugees from Sri Lanka and Tibet has been generously accommodated by India and accorded varying treatment which includes loans being granted and employments being generated for their sustenance.

32 Afghan, Palestinian, Burmese and Somalian refugees do not receive any assistance from the state and are mostly dependent on UNHCR for socio-economic assistance. See, Human Rights Law Network, Report of Refugee Populations in India, 2 (Nov., 2007), http://www.hrln.org/admin/issue/subpdf/Refugee_populations_in_India.pdf (last updated July 21, 2017). See also, UNHCR Statistical Yearbook-India, 2003, UNHCR Geneva.

nized by the government nor by UNHCR.33

Due to ambiguity in the existing policies, the image of the Rohingyas in India is despicable- stateless, foreigner, Bangladeshis, illiterate and a serious cause for concern. They are not accorded any assistance by the government and are compelled to rely solely on UNHCR for recognition of their asylum claims and assistance. To this end, the UNHCR receive assistance alongside guidance from the United Nations Development Programme andundertakes the Refugee Status Determination (RSD) process by scrutinising claims of refuge and recognise them as "refugees".34 Such an acknowledgement by UNHCR, though not formally recognised by the government, has been taken into consideration by the government on most occasions by issuing Long Term Visas (LTVs) so as to allow most of the refugees an extended stay in India. Further, such procedures adopted by the government also entitles refugees to certain socio-economic entitlements, for instance, access to education, employment in unorganised sectors etc, thus creating a *de facto* refugee protection regime in India.35

LIFE IN EXILE: CHALLENGES& ROADBLOCKS

In practice, it is extremely unfortunate to note that the series of occurrences governing the harried exodus of the Rohingyas from the Rakhine province of Myanmar is never taken into consideration at the time of their migration into India as they continue to be dealt as ordinary foreigners without valid documents and prosecuted for contravening relevant laws and policies governing foreigners in India, for instance, the Foreigners Act, 194636. In spite

33 Around 12,134 Chin refugees and Asylum seekers from Myanmar reside in India who is not offered direct assistance and protection by the Indian government. However, they are eligible to apply before UNHCR for grant of individual refugee status. See, Jesuit Refugee Service, South Asia, Study on Chin Refugees in Delhi: Realities and Challenges, 13 (November, 2013), https://jrssa.org/Assets/Publications/File/ChinRefugeesDelhi.pdf (last updated July 21, 2017).

34 SAHANA BASAVAPATNA, Where do I belong? The Stateless Rohingyas in India, in ROHINGYAS: THE EMERGENCE OF A STATELESS COMMUNITY 39 (S. Basu Ray Chaudhary & R. Samaddar eds., 2015).

35 ACHARYA, supra note 22 at 6.

36 See sections 14, 14A and 14B

of India not being a party to the 1951 Refugee Convention nor to the 1967 Protocol, it has endeavoured to adhere to its international obligations37 by incorporating few provisions38 in the Constitution that envisages an understanding of refugee protection culled by the apex court of the country and the High court's by elucidating the expression "person" to be construed as citizens and non-citizens residing in India.The Supreme Court has also made a specific observation39 with regards to the responsibility of the state and its instrumentalities to secure the life and liberty of every human being. Consequently, a catena of rights with respect to protection against arbitrary arrest40, protection against *ex post facto laws41*, double jeopardy42, self incrimination43, freedom of religion44 and right to constitutional remedies45 are available to refugees, immigrants and aliens as well.

Against this background, it is disappointing to note that a large number of Rohingyas are unable to access office of UNHCR in Delhi and continues to languish in prisons and observation homes without any legal representation even after completion of their sentences. West Bengal and Assam, particularly considered being the transit states for these communities, record a considerable number of Rohingya detainees waiting to be registered with UNHCR. Those who somehow manage to reach Delhi have to put up with several rounds of interrogation to substantiate reasons for their ex-

37 Inspite of India not being a party to the 1951 Refugee Convention or the 1967 Protocol, India is bound to safeguard refugees pursuant to its international obligations that emanate from ratifying several international instruments; International Covenant on Civil and Political Rights 1966, art.13, UN Convention against Torture 1984, art.10, UN Convention on Elimination of Racial Discrimination, arts. 5 and 6,UN Convention on Elimination of all Discrimination against Women 1979.

38 INDIA CONST. arts 13, 14, 15, 20, 21, 22, 23, 24, 25, 27, 32 and 51.

39 National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 S.C.C. 742.

40 Louis De Raedt v. Union of India, A.I.R. 1981 S.C. 1886.

41 INDIA CONST. art. 20(1).

42 Id. art. 20 (2).

43 Id. art.20(3).

44 Majid Ahmed Abdul Majid Mohd. Jad Al-Hak v. Union of India, Criminal Writ Petition No. 60 of 1997, Decided in 1997 before Delhi High Court.

45 INDIA CONST. art.32.

odus and evince their identity, following which a temporary asylum seeker card shall be provided within three to six months, subject to appeasement of UNHCR. However, the entire procedure is quite tedious and requires a minimum wait for two years to finally process their refugee cards. Since their survival in the country is solely dependent on receipt of UNHCR refugee cards, their inability to get the same within a reasonable span of time compounds the hindrances of their day to day pursuits.

A mass exodus from Myanmar might have saved many from the ultimate clutches of death but their habitations in India are miserable and marked by poor sanitation, lack of proper hygiene, widespread malnutrition and inadequate access to basic necessities of life. In essence, the Rohingyas, who have already endured brutality, persecution and displacement in their native state, are being further subjected to gross violations of human rights in the country. Even a Writ Petition titled *Jaffar Ullah and Anr.* v. *Union of India* preferred by the refugees themselves before the apex court of the country under Article 32 of the Constitution praying for implementation of basic schemes and programmes by the Central and StateGovernments to be made applicable to the non citizens residing in India has provided limited relief to the community.46 The petition was an honest effort to put forth the appalling conditions in the 'makeshift camps'47 spread across India in Jammu, Delhi, Mewat, Jaipur and Hyderabad, where elementary education, basic health care facilities and an environment conducive for leading a dignified life are denied.

Inspite of the petition explicitly asking for humanitarian assistance,48 only few of the implementing partners of UNHCR have initiated sensitization programs in the community with regards to proper schooling and enabling enhanced access for refugee children to schools.49 Besides, there have been a rising number of instanc-

46 Jaffar Ullah and Anr v. Union of India, W.P(C) No. 859 of 2013 before Supreme Court of India. Copy of the Petition was accessed on the website of Human Rights Law Network (www.hrln.org)

47 Id. at para 1.

48 See id.

49 Development and Justice Initiative, Urban Profiling of Refugee Situations in

es, of late, where several Rohingya refugees are detained despite possessing valid refugee cards. Their cards are seized by the police on the ground that these cards are meant for staying in a particular place and not free movement across the country. The lackadaisical approach of the law enforcement officials is evident from the persistent arrests of the refugees (people with valid Identity cards) on the premise that such cards issued in Delhi restricts their movement within the National Capital Region and are not valid elsewhere.Little do they know that these people often visit the correctional homes in search of their relatives and end up going behind bars.

Therefore, inspite of India's long standing tradition of generosity and tolerance towards refugees, the incrimination of Rohingya Muslims continues to be a harsh reality in India having regard to inadequate laws and obscure policies enshrined by the executive for the purpose of securing rights of the asylum seekers. Absolute reliance on the Foreigners Act,which refuses to afford neither protection nor any legal pathway towards securing residence,defeats the very need of the hour- to create a consolidated legal framework for addressing any refugee crisis and undertake a holistic understanding of the status of Rohingya Muslims in International legal regime. Although innumerable media reports of thousands of Rohingyas trapped in high seas, fleeing persecution continue to grab world's attention towards the "most persecuted people", yet they remain unwanted and inadmissible to most of the Southeast Asian countries.

RECOMMENDATIONS

Thus it is evident from the foregoing paragraphs that the International regime of refugee rights and fundamental tenet of *non-refoulment* have not been honoured in totality, vis-a-vis Rohingya, either through executive actions or judicial interventions. The recent move by the Narendra Modi led BJP Government to deport 40,000 Rohingya refugees in India not only flouts its own Standard Operating Procedure dealing with foreigners seeking protection from persecution but has also been a cause of ongoing trauma for the community and contravenes all humanitarian principles. Instead,

Delhi, 2013, http://www.daji.org.in/images/stories/original_urban_profiling_of_refugees_situations_in_delhi.pdf (last updated July 21, 2017)

India along with other SAARC countries shall engage with Myanmar and pursue a long term durable solution to resolve this issue. Further, Indian government shall undertake necessary amendments to the Foreigners Act to distinguish refugees from various categories of foreigners, for instance: Tourists, Economic Migrants, Internally Displaced Persons (IDP). Such explicit distinctions would particularly aid in sensitizing the local authorities, police and paramilitary personnel to recognize the UNHCR issued refugee identity cards as valid identity proofs of these refugees in order to prevent their push backs and incarceration. It shall also be the responsibility of the government to ensure that free and quality legal representation is provided to these people detained in Correctional Homes. Besides, the state shall also ensure reintegration of the incarcerated refugee families, particularly the children with their mothers, and a due process shall be followed in all such cases.

UNIVERSALISM AND INTERNATIONAL LAW: A CLASSICAL PARADOX

Shibam Talukdar

Abstract: The perennially contentious subject of the true nature of international law has been discussed in this research paper. Titled "Universalism and International Law: A Classical Paradox", the research paper traces the origin and evolutionary steps of international law through the ages and tries, thereby, to understand the nature of international law. Many scholars have, for long, stated that international law is a product of European thought and customary practices whereas, others have stated that international law truly is representative of the cultural frameworks of various civilizations and nation states all over the world. The research paper is an effort at delving deeper into the factors that have shaped the fibre of international law as it exists today, and it tries to determine the true character of international law.

INTRODUCTION

International law, in the classical sense, is the product of European legal thought. It was imposed imperialistically upon the world throughout the nineteenth century and the first half of the twentieth. In this regard, it is noteworthy to see that the emergence of new states has caused significant changes in the development of international law. Although the states of Africa and Asia existed long before the so-called modern states and their cultural backdrop dates back to times much earlier to that of the newer states, they have been thoroughly exploited by means of colonization till the end of the Second World War.[1] The highly pedantic approach of international law was meant for all the nation states of the world, and it was not to be restricted to a particular continent. International law was to be applied to all the nations of the world and it was not to consider the judicial culture and the traditional concept of law adopted by the countries. It has always been apprehended that the so-called barbarian nations would pose a hindrance to the direct

1 R.P. Anand, *New States and International Law*, Hope India Publications, Gurgaon, 2008, pp. 3-9.

application of international law, nevertheless, it remains a fact that in principle, the highly formalistic and egalitarian nature of this type of law was designed for universal application.[2] The European states grounded their international law in jus publicum europaeum which is a positive law that acknowledges each state's sovereignty and right of war, while it eliminates any possibility of criminalizing its sovereign's conduct. The states were considered to be 'just hosts' and that vested them with the power to act without a justifiable cause. But, quite contrary to the previous principle, the legitimization of the European states' colonial dominion was justified by dint of its linkage to natural law which also justified its claim to validity. This typical nature of international law formulated by the Europeans which governed relations between secular and Christian states in the European geopolitical area, but at the same time claimed universality.[3] Thus, right from the genesis of international law, the application of international law in a 'universal' sense was indeterminate.

INTERNATIONAL LAW AS EUROPEAN LAW – A STUDY

International law grew out of the conscience of Europe's Christian people, and in spite of that, as claimed by J.C. Bluntschli, it could be extended to non-Christian people as well because according to him international law had its foundational basis in natural law and therefore its scope was universal and it cut across all forms of cultural differences.[4] International law has been, thus, formulated in such a way so as to accommodate people of all faiths and varying ideologies. In the 1860s and 1870s, during the time of colonization, many different cultures that were not Christian were seen to be existent, but however, it was not possible to accommodate them within the scope of the universality of international law. Thus, the scope of the international law was to be extended and the European

2 Emmanuelle Jouannet, "Universalism of International Law and Imperialism: The True-False Paradox of International Law?", p. 36.

3 Gustavo Gozzi, "The Particularistic Universalism of International Law in the Nineteenth Century", *Harvard International Law Journal – Online*, 2010, Vol. 52, p. 75.

4 Gustavo Gozzi, "The Particularistic Universalism of International Law in the Nineteenth Century", *Harvard International Law Journal – Online*, 2010, Vol. 52, pp. 75-76.

state asserted their superiority on the basis of which the extension of international law beyond Europe was made. Whenever a question arose as to how to extend the international law to the 'non-civilized' people, 'Europeanness' was reiterated thereby ensuring the superiority of Europe over non-European states.5

This exertion of superiority has resulted in the exercise of powers that has continually tried to put Europe at a superior position. The development of international law which finds its foundational basis in European states has till date been a reason why the areas of the two laws overlap. The principles of international law and the various treaties that have thus been adopted can seem to find their roots in the principles formulated in the European states.6

The validity of 'sovereign' is thus at stake and in the modern international set-up, the extent of 'sovereign' exercise of powers is of great debate. If the fact that international law is not Eurocentric is acknowledged, then it should also be acknowledged that when European nations came in contact with other nations, such contact resulted in cross-cultural borrowing and the fact that other nations were also shaped by such a contact, has also to be recognized.7

The International law created in the vein of European law cannot be deemed as 'universal' for the reason that the latter was formulated with a specific mind-set in consideration. Western European cultural is distinct from the other cultural traditions of the world, it being "highly materialistic, competitive, individualistic, narcissistic and places great emphasis on the consumption of natural resources and material goals".8 The core cultural mechanism that drives Western civilization is such that the scope for dominance over other "races" ensures superiority and hence strife for superiority roots out from the materialistic nature that drives the civilization. Con-

5 Gustavo Gozzi, "History of International Law and Western Civilization", *International Community Law Review,* 9 (2007) pp. 353-373.

6 F. E. Dowrick, "Overlapping European and International Laws", *The International and Comparative Law Quarterly*, Vol. 31, No. 1 (Jan. 1982), pp. 59-98.

7 James Thuo Gathii, "International Law and Eurocentricity" available at http://www.ejil.org/pdfs/9/1/1476.pdf

8 Kenneth B. Nunn, "Law as a Eurocentric Enterprise", 15 Law & Ineq. 323 (1997), pp. 325-326

secutively, it can be stated that European law strives perpetually to exert dominance over other states and it can be seen as one of the primary causes "behind racism, colonialism and group-based oppression".9

The apparent superiority of international law would take racial overtones on certain occasions. The claim of Bluntschli that the Christian people have a better sense of self as compared to the Semites whose reverence to God took over their sense of freedom justified the stance. Such racial stances were repeated by the 19th-century scholars although that would not have been necessary in order to establish the superiority of the European states over the non-European ones. The idea of national sovereignty was an instrument which legitimized the dominion over the lands taken by the Western countries in the course of the colonial expansion. The claim that international law was a product of Western scientific consciousness and that such a law was different from other laws in the lands of non-European states was seen to be a reason why this law could not be extended to Muslim nations. Thus, the rights which were extended to the Muslim nations were recognized in a formal manner only out of respect for the common humanity so as to treat all the "non-civilized" people "humanely".10

The consciousness, logic, and values of the law reflect those of the European laws. Eurocentric laws are fostered and promoted in the guise of international law so as to reflect and promote the ideals on which they were formulated.11

2.1International Law as European Law – An Analysis

International law, today, can, thus, be said to be rooted deeply in the consciousness of the European people and the laws formulated, hence, can be said to be the product of such consciousness which reflect, largely, the ideals of the Western civilization. If this thought is taken into consideration, it can also

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9 *Ibid.*

10 Gustavo Gozzi, "History of International Law and Western Civilization", *International Community Law Review,* 9 (2007) pp. 356-357.

11 Kenneth B. Nunn, "Law as a Eurocentric Enterprise", 15 Law & Ineq. 323 (1997), pp. 338-339

be observed that international law does not truly reflect the ideals of the nations which are not European. In this regard, the 'universality' of international law can be put to question. If international law was truly devised to be a law that would be universally applicable irrespective of the judicial cultures, then the ideals of such universality should also have been reflected in the law. This, however, is not the situation in this modern day world. The laws formulated, by large, reflect European values thereby disregarding the local laws or cultures of the non-European states. Such a forceful imposition of values would not only prove to be disregarding the laws or cultures of non-European states, but along with that, such dominion would also lead to putting at risk their local traditional legal set-up, and ultimately such distinctions in the ideologies would defeat the purpose of universalism which was to be at the core of the framework of international law.

UNIVERSALISM AND INTERNATIONAL LAW – A STUDY

International law, although being a product of Western civilization, is supposed to be universal in its applicability. For a long time, international law has been used as a tool by the powerful nations to exert dominance over the less powerful ones thus placing European states at the upper levels of the power-hierarchy.12 International law has been used to establish jural relations between colonial powers and the native peoples and thus it became the foundation for intervention in the affairs of these people and take over their region and such an intervention was said to be done with a "humanitarian" purpose. International law has been used to create a distinction between the "civilized" West and the "non-civilized" non-West, and thus accordingly it legitimized the intervention of the sovereign powers of the Western nations.13 Thus, instead of being 'universal' in nature, international law has been showing traits of being 'imperialistic' in nature. This gives rise to the paradox that the research project is based on. If in fact, international law was created to be of a universal nature, the basis of

12 Kenneth B. Nunn, "Law as a Eurocentric Enterprise", 15 Law & Ineq. 323 (1997), pp. 328-329

13 Gustavo Gozzi, "History of International Law and Western Civilization", *International Community Law Review,* 9 (2007) p. 359.

which was formulated in European states, the blatant disregard for the non-interference into the matters of other states have proved universal law to be of a rather 'imperialistic' nature. The Third World Nations have perpetually been exploited and the legitimization of such exploitation has been made possible because of the powers exerted by the nations which are powerful.14

Article 2 (4) of the United Nations Charter prohibits the use of force in international relations and Article 2 (7) of the United Nations Charter mandates non-intervention by other states in the internal affairs of a state. Therefore, it is difficult to justify humanitarian intervention if there are no valid grounds for an exception to the principles of international law. However, the crises in the states of Somalia, Liberia, Rwanda, Burundi, and Bosnia, among other states facing such humanitarian crises was an indication of the fact that United Nations was 'unable' to address such crises effectively so as to protect the human lives unless it was in the interest of the major powers to do so.15 This fact shows that the discretion to act so as to ensure the protection of human lives was with the major powers of the world and they could act according to their will so as to exert dominion over the states under crises. Essentially being a product of the European thought, international law has sought to create a system so as to include all the nation states of the world within its ambit. The legitimization of imperialism and colonial practices of the Western states has been made possible with using international law as an instrument in order to exert dominance over the so-called "barbaric" states. The treatment of non-European states as being inferior has not only led the European states to treat them differently, racial prejudices against such nation-states have also been a derivative of such treatment. The paradox that international law is not 'universal' in practice is valid until the present day.16 International law is said to be formalistic

14 B.S. Chimni, "Third World Approaches to International Law: A Manifesto", *International Community Law Review* 8: 3-27, 2006.

15 Ved P. Nanda, "Humanitarian Intervention under International Law and U.N. Charter", *International Law Issues and Challenges*, Hope India Publications, Gurgaon, 2009, p. 115.

16 Emmanuelle Jouannet, "Universalism of International Law and Imperialism: The True-False Paradox of International Law?", pp. 383-385.

in nature and the tenets of international law have been said to be "sufficiently abstract" so as to be able to engulf all the non-European states within its ambit. Although the fact that international law has been used largely as an instrument in order to spread imperialism and colonialism in the rest of the world thereby deriding the cultural basis of the non-European states causing disastrous damage to the human, cultural and political set-up of those states cannot be denied, it must also be acknowledged that the reason for the sustenance of international law to the present day has been made possible due to the abstraction and formalism that international law has in its nature.17

This, however, does not imply the political neutrality of international law since it continues to be a product of European liberal thought and as much as it is a factor of integration, it is a factor of exclusion.18

International law is supposed to be universal and no distinction can be made regarding the applicability of the law to all the parts of the world. As stated by Oppenheim, international law should strive to make the membership to the international community to all the nation states of the world irrespective of "religious, geographical or cultural differences."19

3.1 Universalism and International Law – An Analysis

The universality of international law is put at the question by observing the various instruments employed in order to exert superiority. The paradox that the topic tries to discuss is largely based on the assumption or notion that international law is not supposed to be favored or biased or and that it should not be used as a mechanism for exercising dominance, rather it should be of a nature that ensures universality so as to accommodate all the nation states of the world within its scope. Deviance from this belief has been the source of the ordeal that the Asian and African nations have had to face over time. The true nature of international law, in the ideal

17 Ibid.

18 Ibid.

19 R.P. Anand, *New States and International Law*, Hope India Publications, Gurgaon, 2008, p. 117.

sense, would be identified, if, in practice, international law was applicable to all the nation states of the world in a manner that would protect the sovereignty of all nations across the globe. But that is where the paradox finds its basis, in the fact that sovereignty of nations has been seriously compromised and the tool for doing so has been international law.

The paradox can further be delved into by observing the fact that a tool which is used to spread imperialism and colonization has been termed as 'universal'. If in fact, international law was universal, the colonization of the non-European states by the European ones could be justified, if international law was truly interpreted in the European way of thought. Such legitimization of the practices which show disregard towards the sovereignty of the non-European nations and ultimately result in the 'seizure' of such sovereignty not only defeats the purpose of a 'universal' international law but also the extent of application of a 'true' international law is put a question.

CONCLUSION

International law is required to be of a nature that engulfs within its scope all the nation states of the world without bias towards the nation states which are less powerful as compared to other economically stable states. Since its inception, which was of European origin, the more powerful states have tried to exert dominance over the less powerful ones through various mechanisms. The act of colonization of regions of Asia and Africa are some of the prime instances where the impartment of ideals has been forced, albeit without the consent of the inhabitants of those regions. In the name of "intervention", so as to stop any kind of ongoing war or crisis, the powerful states enter the comparatively less powerful ones and take control of the situation, thereby exerting power over the less powerful states.

The Eurocentricity of international law has ensured the reflection of European values in the tenets of international law. European nations have used international law to promote their ideals and also exert dominion over the non-European states in the guise of international law being 'universal'. Thus, 'universality' in interna-

tional law has been used only as a front to conceal the professing of European values in the non-European states.

The United Nations Charter, if interpreted in a veritable manner, has constantly tried to vouch for protecting all the nation states from external disturbances, so as to maintain their political independence thereby ensuring peace and tranquility among all the states. But, the present situation is such that blatant disregard for the provisions of the Charter and defiance of its principles in the name of 'justifiable' cause has become commonplace for the countries exerting such powers. The illegitimate use of power to exercise control has become a common phenomenon, such control being exercised by the powerful states. If such views are considered, the true nature of universality of international law is seen to be uncertain. The object of a truly humanistic approach to ensuring rights of the people of all the nation states of the world would be achieved if the universality, in the true sense, of international law is endeavored. The façade which the European nations use to exercise supremacy over non-European nations has been the reason behind the failure to achieve a 'universal' international law.

STRUCTURAL ADJUSTMENT PROGRAMS AND CONDITIONALITY ATTACHED TO AID: THE CONSEQUENCES OF STRUCTURAL ADJUSTMENT PROGRAMS EXPERIENCED BY THE REPUBLIC OF GHANA

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ABSTRACT

Globalization, Human Rights and International Financial Institutions are the three concepts that extensively relates to one another. Human Rights are the universal, inalienable and indivisible rights that every human being is entitled to by virtue of being human. These rights should be protected and promoted by the governments of theirrespective countries. However, at this stage of globalization, the scope of human rights too is widened. Protection and promotion of human rights is not confined to the national boundaries but it scatters to the world community at large. Therefore, despite being international institutions, IFIs also comes under the purview of human rights and they too are expected to respect and safeguard these rights. This paper looks into the human rights aspect of the International Financial Institutions and how they have brought the human rights at stack.

KEY WORDS

Globalization, International Financial Institutions (IFIs), Structural Adjustment Programs (SAPs), Republic of Ghana

INTRODUCTION

International Financial Institutions or IFIs are those institutions that provide financial support by grants or loans for economic and social development activities in the developing countries. International Financial Institutions include public banks, Internation-

al Monetary Fund and regional development banks. They provide loans, grants and technical assistance to governments, as well as loans to private businesses investing in developing countries. The International Financial Institutions, no doubt, are contributing a lot in combating poverty and in providing economic support to the developing countries around the world. In the last decade, the International Financial Institutions (IFIs) have contributed a lot to address financial crisis, assist governments that are making economic and social reforms and help poor countries find new ways to develop and grow. However, their approach to economic growth has historically produced enormous debt among developing countries, unfairly favoured wealthy and politically powerful elites and offered few safeguards to protect the environmental, social and human rights of citizens in the face of large-scale development. In a way, International Financial Institutions are a result of Globalization. According to Anthony Giddens, Director of the London School of Economics, Globalization is the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa. Globalization is shrinking space, shrinking time and disappearing borders are linking people's lives more deeply, more intensely, more immediately than ever before.[1] Globalization affects every aspect of human existence. Every single person, the poorest of poor and richest of rich, are affected by this process of globalization whether positively or negatively. However, though the impact of globalization is present everywhere; the economic aspect of globalisation is given more significance. Escaping poverty is possible only with partnership and collaboration at the international level. At the present day situation, International Financial Institutions (IFIs) like the International Monetary Fund, World Bank, Multilateral Development Banks and other international development agencies are major sources of financial and technical support for the developing countries. They also play a significant role in responding to the needs of the developing countries and to ensure that every part of the globe, even the world's poorest countries, gets enough oppor-

1 . "Globalization and its impact on the full enjoyment of allhuman rights", Preliminary report of the Secretary-General, United Nations General Assembly, http://www.un.org/documents/ga/docs/55/a55342.pdf (September 22, 2015).

tunities of development.[2] However, everything has its positive and negative sides; International Financial Institutions too have many inherent loopholes. The limitations put by these institutions on the decision making power of the individual states and the major human rights violations caused by them cannot be overlooked. This paper looks into the linkage between globalization, human rights and the International Financial Institutions. Further, an attempt will also be made to look into negative role played by the International Financial Institutions in the violations of human rights of the people residing in the developing countries and also the miseries the government of these countries face in repaying the loans. This paper specifically emphasises on the human rights violations caused by Structural Adjustment Policies adopted by the IFIs.

OBJECTIVES

The main object of this research are-

To identify the linkage between globalization, human rights and International Financial Institutions and analyse the role of International Financial Institutions in bringing economic stability in the developing countries.

To study the concept of economic globalization and the role of IFIs at the present era.

To look into the human rights obligations of the IFIs.

To analyse the impact of conditional aid on the third world countries.

To narrow down a set of recommendations that might reduce the human rights violations created by these institutions.

SCOPE AND LIMITATIONS

The scope is this work extends to identifying the relation of International Financial Institutions with globalization and human rights. The concept of human rights is gaining international recognition only because of globalization. However, on the other hand, International Financial Institutions which are a product of globalization are responsible in affecting the human rights in a negative manner.

2 . "International Financial Institutions", Center for Global Development, http://www.cgdev.org/topics/ifi, (September 11, 2015).

Therefore, in the work an attempt will be made to analyse how human rights are challenged by the IFIs.

In the light of the objectives and purposes of this study; the work is confined to looking into the Structural Adjustment Programs (SAPs) and how they are undermining the abilities of the national governments to decide their own policies, programmes and investments. This work will not extend to analysing the other policies or actions that might also lead to gross human rights violations.

STATEMENT OF PROBLEM

Considering the present day needs, the existence of the International Financial Institutions is pretty well justified. These institutions do play a major role at the time of financial crisis. Mainly the developing countries are greatly benefited by these institutions to carry out its development activities or by playing the role of a support system at the time of crisis. However, on the other side of it, many countries have experienced the consequences of failure to repay the loans on time. Again the structural adjustment policies (SAPs) adopted by the IFIs poses a major threat of violating the human rights of the people residing in the developed countries.

RESEARCH PROBLEMS

The International Financial Institutions which were established to promote economic and social progress in poor or developing countries by helping raise standards of living and productivity to the point at which development becomes self-sustaining. However, in the present time, the developing countries are heavily relying on these institutions and are facing its consequences. This work analyses how the increasing popularity of the financial institutions may pose a threat to the rights of people residing in the third world countries.

LITERATURE REVIEW

The researcher has reviewed a number of books, journals, articles and magazines relevant to the issue in hand.

The relation between human rights and the responsibility of the financial institutions to respect or protect those rights is a contro-

versial issue. Ibrahim F.I. Shihata in his paper ***Human Rights, Development, and International Financial Institutions (1992-1993)*** puts a very critical question. For the International Financial Institutions like World Bank, the question is not whether human rights are relevant to development, but whether the mandate of such an institution can cover the promotion and protection of all human rights or is limited to the rights which have an economic or social character as opposed to political character. The author also points out that political manipulation of these financial institutions by members in pursuit of their perceived national interests is unavoidable once political considerations are allowed to be freely taken into account.The plight of individuals may be accompanied by ensuring that economic and social adjustment programs will be accompanied by measures to minimize their negative effect on the poor. Alleviation of the present sufferings is possible when the financial institutions give priority to welfare sectors like education, health care and activities beneficial for future improvements.

Mere financial support in the form of grants or loans in not enough; if the other party is not given the freedom to use that money based on their own needs. IFIs like the World Bank and International Monetary Fund (IMF) are no doubt assisting the developing countries by providing financial assistance; but, the loans that the developing countries receive are condition-based loans. The developing countries even though are getting assistance; they are not given the liberty to use that money based on the specific needs of their country. BharatiSadasivam authored***The Impact of Structural Adjustment on Women: aGovernance and Human Rights Agenda (1997)*** puts light on the deprivations that the people of developing countries are facing as a result of the structural adjustment programs (SAPs). The author in this article studies the impact of SAP on the lives of women. This work is confined to the miseries that women face as a result of Structural Adjustment Programs and is not inclusive of the other dimensions of the impact of SAP.

At the present era of globalization and rapid economic growth, the significance of IFIs cannot be overlooked merely because it brings number of challenges to the third world countries. Rather, a work-

able solution has to be identified which will enable the developing countries to escape obligations. ***Structural Adjustment Programs (1998)*** is a beautiful article co-authored byCarol Welch and Jason Oringer. The authors, in this work puts light on the historical background of Structural Adjustment Programs (SAPs) wherein they mention that throughout the 1980s and 1990s the United States has been a principal force in imposing Structural Programs or SAPs on most countries of the South. This article also talks about neo structuralism sponsored by the IFIs which aims at reducing the social and political impact of SAPs by providing temporary job programs and other relief measures.

A major challenge is created when getting help becomes a habit. Allan H. Meltzer in his article ***Reforming the International Financial Institutions: A Plan for Financial Stability and Economic Development (2001)*** points out that the world economy and the international financial system are now very different from what was envisioned in 1944 during the establishment of the International Monetary Fund and the World Bank at the Bretton Woods conference. These principal international financial institutions have responded to the many changes and crisis in recent decades by expanding their mandates or by adding new lending facilities and programs. Some countries have grown to rely excessively on short-term private capital inflows to finance long-term development which has caused crisis throughout history. The author in this paper points out the major challenges that the International Financial Institutions are facing and why there is a massive need for structural changes.

Considering the situations and the responsibilities that the countries are facing at the current era of globalization, the need and importance of the International Financial Institutions can very well be justified. However, these institutions are not just assisting the developing countries to prosper, but also contributing to gross human rights violations of the people residing in such countries. Anup Shah authored ***Structural Adjustment- a Major Cause of Poverty (2013)*** rightly links poverty with Structural Adjustment Policies of the developed nations. At the present era the third world countries

are highly depending on the richer nations. International Financial Institutions like IMF and World Bank have demanded the poor nations lower the standards of living of their people, because, even if the poor countries are assisted to progress, the sectors where such assistance is to be used is also prescribed by these institutions. As a result of globalization and the increasing popularity of the International Financial Institutions there is a massive reduction in the ability of the governments of the poor countries to make important decisions for their people. In this article the author has given a general idea about how IFIs are causing poverty, which is a major human rights issue. This work is not confined to any particular country or incident where structural adjustment policy has resulted into poverty or any other major human rights violation.

Reviewing the available literatures on the present topic, the researcher identified that a lot of scholarly work has already been done on the role of International Financial Institutions andthe impact of Structural Adjustment Programs (SAPs) on the people residing in the developing countries. However, the available literatures do not give much emphasis on the human rights violations that are resulted by the activities of International Financial Institutions and how policies like SAPs are minimizing the national government's ability to work for the upliftment of their nationals.

RESEARCH HYPOTHESES

The International Financial Institutions that were originally established for the economic welfare and betterment of the third world countries are not contributing much towards its actual aim.

Rather than addressing the needs and problems of the developing countries, the IFIs are many a time seen comforting the developed countries.

IFIs are majorly responsible for violating the human rights of the people because they refuse to accept their human rights obligations.

RESEARCH METHOD

The method adopted by the researcher in this work entitled "Glo-

balization, Human Rights and International Financial Institutions" is descriptive and analytical in nature. The researcher has adopted the doctrinal method on the basis of the data available regarding the present study. The researcher has referred to a great number of books, journals, articles and e-books in preparing this work. This research is also analytical in nature because it analyses how the human rights of the people from the developing countries get affected. Further, this work analyses challenges that the IFIs brings to the third world countries.

RESEARCH SCHEME

In the light of the objectives, hypothesis and the indicators formulated by the researcher the study has been classified in following chapters for convenience and systematic study as:

The first part of this paper titled 'Introduction' provides a brief introduction into the entire subject matter of study in hand wherein the researcher highlighted the basic understanding of the topic in general. It also includes the review of existing literatures on that area. Further, it provides an analysis of the problem and the hypotheses as well as the scope and limitations of the research undertaken. Lastly, the objective, the tentative chapterization and the method used for the research has also been highlighted.

The second part of this paper titled 'Economic Globalization and Human Rights' provides a brief introduction of the significance of the International Financial Institutions in the contemporary period. This part also discusses the obligation of the IFIs to promote, protect and respect human rights.

The next part of this paper entitled 'Structural Adjustment Programs and Conditionality Attached to Aid' discusses the conditionality attached to aid given by the IFIs. The researcher, in this part, will further try to analyse the impact of the adjustment programs on human rights of the people residing in the third world countries.

The last part titled 'Conclusion and Suggestions' sums up the whole project and tries to give a general idea about how human rights are affected by the IFIs and why it is so important that the IFIs starts accepting their human rights obligations.

ECONOMIC GLOBALIZATION AND HUMAN RIGHTS

In the contemporary discourse of human rights, the nature and impact of economic globalization on human rights is a hot topic. Economic globalization is not merely an economic process relating to the movement of capital, goods and services among nations. It also signifies a comprehensive socio-economic, cultural and political project capable enough to redefine the relationship between state and citizen in such a way that the citizens hardly matter in actual governance process. All crucial decisions relating to public policies are taken by investors and International Financial Institutions (IFIs).[3] Conditionality of loans administered by World Bank, International Monitory Fund etc. insists that the recipient governmental does not use public resources for poverty alleviation and social distress, but rather to build a high-growth economy. Though there is improvement in aggregate economic wellbeing as a result of these policies of globalization, but material inequality is on the rise, making the rich richer and the poor poorer.[4]

At this age of globalization, the promotion and protection of human rights is not possible in isolation. The gap between individuals, governments and the States are minimizing. Decisions taken and actions performed at one part of the globe affects the people of other parts and their human rights very easily. Therefore, it is important that the International Financial Institutions must uphold human rights in all activities they support. The decisions, policies and projects promoted by International Financial Institutions (IFIs) have significant and often far-reaching impacts on the human rights of the people. The impacts of these institutions may either be positive (for example contributing to poverty reduction) or negative (for example sufferings of the poor and marginalized individuals and communities). The negative impacts of the International Financial Institutions (IFIs) is mainly because these institutions frequently invest in industries such as energy and resource extraction projects, such as large scale infrastructure development, associated with environmental damage and human rights abuses like forced

3 .P. Sukumaran Nair (ed.), HUMAN RIGHTS IN CHANGING WORLD, 1st ed. 2011, p. 45-46.

4 .*Ibid.* p. 42.

evictions. The projects that the IFIs support are frequently carried out in countries that may face significant challenges in ensuring the effective protection of human rights. Though promotion and protection of human rights primarily lies with the state, the IFIs and their member states also have responsibilities to ensure that activities they support do not cause, or contribute to, human rights abuses by putting in place adequate safeguards. However, many International Financial Institutions (IFIs) regard human rights as a political issue for states and refuse to accept that they too have a responsibility to ensure respect for human rights in the activities they support. The IFIs are large and powerful organizations and the consequences of their refusal to meet the human rights responsibilities can be significant. It is the need of the hour that all IFIs should implement human rights due diligence measures, including human rights impact assessments and human rights safeguard policies, which are consistent with international human rights laws and standards. Due diligence should inform not just project design, but also project implementation and evaluation. IFIs and the activities that they support should be carefully monitored to access their ongoing impact on human rights, as well as the presence of effective procedures for ensuring accountability for human rights violations.[5]

Human rights obligation of the IFIs is not a new trend but it is a well-documented concept. The 2011 UN International Law Commission's 'Draft Articles on Responsibility of International Obligations' pointed out that intergovernmental organizations, such as IFIs, are subjects of international law, and as such they have international law obligations that they must comply with. The 'Draft Articles on Responsibility of International Obligations' also point out the international responsibility of both the organizations and the member states concerned.

The 2012 'Maastricht Principles on Extraterritorial Obligations of

5 . "World Bank and Other International Financial Institutions Must Uphold Human Rights in all Activities they Support", The Global Initiative for Economic, Social and Cultural Rights, http://globalinitiative-escr.org/the-world-bank-and-other-international-financial-institutions-must-uphold-human-rights-in-all-activities-they-support/ (October 1, 2015).

States in the area of Economic, Social and Cultural Rights[6] articulated the human rights obligations of states when acting jointly through an intergovernmental organisation (for example IFIs). The refusal of IFIs to accept their human rights obligations can no more be tolerated. Therefore, the United Nations Human Rights Council must take concentrated and expeditious actions to elaborate and reinforce the human rights obligations of the IFIs.

STRUCTURAL ADJUSTMENT PROGRAMS AND CONDITIONALITY ATTACHED TO AID

Structural Adjustment Programs or conditionality attached to aid and debt reduction is a very common and popular phenomenon of the present time. It is often argued to be the main reason behind the poverty of the third world countries. However, the original rationale for conditionality was to preserve the revolving character of IMF resources and to protect the financial integrity of the Bretton Woods institutions. Reconciling country ownership and participation with the conditionality attached to aid is a major problem that the third world countries, these days, are facing in their approach to poverty reduction. Over the years, however, conditionality has undergone a massive change in the rationale for which it started. It has become tighter, gradually encompassing a large number of areas, including actions related to the restructuring and privatization of public enterprises, deregulation of markets, trade regimes, pricing and marketing policy, public safety nets, public sector management, the financial sector, the energy sector, the agricultural sector, as well as issues of political and economic governance.The rationale behind conditionality attached to aid is pretty well justified. Economic progress is possible only when money revolves from person to person, sector to sector and finally from one country to the other. However, the growing popularity of conditionality among the financial institutions have actually compelled people argue that these conditionalities imposed by the International Financial Insti-

6 . The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights were adopted by a group of experts in international law and human rights on 28 September 2011, at a gathering convened by Maastricht University and the International Commission of Jurists.

tutions (IFIs) go beyond their respective areas of competence. On 5th March 2002 in the 6th Heavily Indebted Poor Countries (HIPC) Ministerial Meeting held in London, the ministers of the Heavily Indebted Poor Countries (HIPC) expressed in their declaration that slow progress in streamlining conditionality was one of the "strong concerns".[7]

The impact of the Structural Adjustment Programs on human rights may be well understood by studying the consequences of SAPs that the Republic of Ghana faced. The implementation of World Bank recommended public sector reforms and economic liberalisation through Structural Adjustment Programmes (SAPs) in Ghana in 1983 resulted in strong improvements in its socio-economic standing and the heightening of its industrial capacity. Supporters of the Bretton Woods Institutions often argue that the countries that institute SAPs experience greater development than non-adjusting countries. However, International Financial Institutions like the World Bank and the IMF see development as being synonymous with national economic growth measured by indicators such as GDP. However, national economic success does not necessarily imply improved wellbeing of citizens. Rather development has to be seen with how goods are distributed, the reduction of poverty, access to life-sustaining goods such as health and water and an improvement in the quality of life for the majority of citizens.The implementation of Structural Adjustment Programmes (SAPs) has failed to reduce poverty or to improve the living conditions for the majority of Ghanaians. Therefore, adjustment programs in Ghana have exacerbated difficult social conditions that have negatively affected human rights.[8] As a result of adjustment program public spending in the social sectors as health and education was drastically reduced and the state subsidies were removed. As a consequence of the structural adjustment, thousands of workers employed in the formal sector industries were retrenched. Living conditions in

7 Kamran Kousari, Structural Adjustment and Poverty Reduction in Africa, http://library.fes.de/pdf-files/gurn/00111.pdf (October 28, 2015).

8 AramideOdutayo, Conditional Development: Ghana Crippled by Structural Adjustment Programmes, Mar 1, 2015, E-International Relations Students, http://www.e-ir.info/2015/03/01/conditional-development-ghana-crippled-by-structural-adjustment-programmes/ (September 29, 2015).

terms of housing and consumption deteriorated. According to one estimate, during 1985-1991 total employment in the large and medium scale formal sector fell by almost 60%.The job-losers had no alternative than to sit ideal in the house, resort to agricultureor to join urban informal economy. In Ghanaian marketplaces women's dominance existed. So, for the unemployed young men, lacking other opportunities, mingling with female hawkers in the streets seemed to be the best option. Not just men, but even women who were previously employed in the formal sectors or who were dependent on the income of their husbands employed in the formal sector; were compelled to join trade. As a result of this surplusthe competition among the traders increased heavily.There was a huge reduction in the income of the women as the number of people associated with food trade increased and not just the women but their male counterparts also joined them. On the one hand, the so called women's informal economic domain was overcrowded; while on the other the profit potential was reduced because of the reducing purchasing power of the customers.Again, when husbands became unemployed and underemployed, a high proportion of women's earnings were spent on household expenses instead of being accumulated and used as investment and working capital. Therefore the once female dominated trading industry that once seemed to be so profitable was no more the same.[9] Structural Adjustment Programs in Ghana failed to improve the conditions of the poor. Considering that development is primarily concerned with reducing poverty and promoting economic growth for all citizens, structural adjustment in Ghana was a total failure.[10]

The Structural Adjustment Policies seeks to eliminate subsidies, reduce price controls while promoting exports and opening up the country to foreign investment. The Narmada Dam project (also known as the SardarSarovar Dam) in India shows the failure of the

9 RagnhildOvera, "When Men do Women's Work: Structural Adjustment, Unemployment and Changing Gender Relations in the Informal Economy of Accra, Ghana", Journal of Modern African Studies, 45, 4 (2007), pp. 539-563.

10 AramideOdutayo, "Conditional Development: Ghana Crippled by Structural Adjustment Programmes", Mar 1, 2015, E-International Relations Students, http://www.e-ir.info/2015/03/01/conditional-development-ghana-crippled-by-structural-adjustment-programmes/ (October 5, 2015).

World Bank to take into displacement of many thousands of people. The construction of roads into Brazil's Amazon jungle shows the failure of the World Bank to take into account environmental damage from forest cutting.[11]

CONCLUSION AND SUGGESTIONS

At this age of globalization, privatization and the increasingly heavy competition among states to reach the top in terms of economic progress, the plight of the poor countries is often been ignored. But competition is always among equals. Conditionality is like an additional inescapable burden for the poor and the third world countries, who are already cursed with poverty and vulnerability. Though the International Financial Institutions (IFIs) are assisting the developing countries to come out of poverty, to do economic progress and compete at the global level; in the presence of conditionality this help and assistance IFIs gets wasted. It is very difficult for the developing countries to come to the mainstream.

The human rights of the people residing in the developing countries may very well be protected and the economic stability of the poor countries may easily be made a reality if the International Financial Institutions (IFIs) and the developed countries of the world are ready to make some temporary sacrifice of growth, possibly to the cost of the poor.[12]

This is the age of globalization and a thing happening in one part of the world is bound to affect the other parts of the globe as well; sooner or later, positively or negatively, directly or indirectly. Poverty, diseases, suffering and violation ofhuman rights in one State will definitely have its effects in the other States. Therefore, it is the time that the world community comes forward in making human rights a global concern and bringing every single person, institutions and governments under the purview of protection and promotion of human rights.

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11 Jonathan A. Fox and L. David Brown (eds.), THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOs AND GRASSROOTS MVEMENTS, The MIT Press, Cambridge, 1st ed. 1998, pp. 219-222.

12 .Kamran Kousari,Structural Adjustment and Poverty Reduction in Africa, http://library.fes.de/pdf-files/gurn/00111.pdf (October 28, 2015).

Before the financial institutions decide to invest on a particular sector, very little attention is given to social impact analysis. However, Structural Adjustment Policies (SAPs) may have unfavourable consequences for the poor. The International Financial Institutions (IFIs) need not give absolute autonomy to the recipient governments. However, little importance is to be given to anti-poverty spending programmes and by undertaking a poverty and social impact analysis (PSIA) before funds are invested in any sector. This will help the countries to easily identifythe kind of measures needed to be adopted subsequently.

The conditionality attached to multilateral lending and debt reliefs severely constraints the freedom of action of recipient governments in determining their development strategies.

Despite the fact that the IFIs play an important role in financing high-impact projects in weak governance zones, no IFI has adopted a comprehensive human rights policy. Most IFIs do have operational policies that address substantive areas such as labour, involuntary resettlement and indigenous peoples. But the policies of International Financial Institutions exhibit wide variability in how they address human rights issues and too often fail to address important human rights values. And where they do address human rights concerns, they often employ definitions and standards that do not meet international human rights norms. The United Nations Human Rights Council must take concentrated and expeditious actions to elaborate and reinforce the human rights obligations of the IFIs. International documents like the Millennium Declaration, the Declaration on the Right to development and the Declaration on the Rights of Indigenous Peoples addresses the role of IFIs to a limited degree; thus greater focus and clarity is required to ensure that IFIs respect and protect human rights in their operations and are held accountable when they fail to do so.[13]

13 ."World Bank and Other International Financial Institutions Must Uphold Human Rights in all Activities they Support", The Global Initiative for Economic, Social and Cultural Rights, http://globalinitiative-escr.org/the-world-bank-and-other-international-financial-institutions-must-uphold-human-rights-in-all-activities-they-support/ (October 1, 2015).

Bibliography

Primary Sources

Draft articles on the responsibility of international organizations 2011

Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights

Books

David D. Bradlw and David B. Hunter (eds.), INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW, Kluwer Law International, The Netherlands, 1st ed. 2010.

Makoto Kasuya (ed.) COPING WITH CRISIS: INTERNATIONAL FINANCIAL INSTITUTIONS IN THE INTERWAR PEIOD, Oxford University Press, New York, 1st ed. 2003.

ThummuluriSiddaiah, INTERNATIONAL FINANCIAL MANAGEMENT, Pearson Education India, 1st ed. 2010.

Madhuvij, INTERNATIONAL FINANCIAL MANAGEMENT, Excel Books India, New Delhi, 2nd ed. 2006.

Kern Alexander, et al., GLOBAL GOVERNANCE OF FINANCIAL SYSTEMS: THE INTERNATIONAL REGULATION OF SYSTEMIC RISK, Oxford University Press, New York, 1st ed. 2006.

Leonie F. Guder, THE ADMINISTRATION OF DEBT RELIEF BY THE INTERNATIONAL FINANCIAL INSTITUTIONS: ALEGAL RECONSTRUCTION OF THE HIPC INITIATIVE, Springer Science & Business Media, New York, 1st ed. 2008.

Andrew Clapham, HUMAN RIGHTS OBLIGATIONS OF NN-STATE ACTORS, Oxford, 1st ed. 2006.

Tony Evans (ed.), HUMAN RIGHTS FIFTY YEARS ON A REAPPRAISAL, Manchester University Press, UK, 1sted. 1998.

P. Sukumaran Nair (ed.), HUMAN RIGHTS IN A CHANGING WORLD, Kalpaz Publications, New Delhi, 1st ed. 2011.

Websites

Anup Shah, “Structural Adjustment- a Major Cause of Poverty”, http://www.globalissues.org/article/3/structural-adjustment-a-major-cause-of-poverty.

Carol Welch and Jason Oringer, “Structural Adjustment Programs”, http://fpif.org/structural_adjustment_programs/

Ibrahim F.I. Shihata, “Human Rights, Development, and International Financial Institutions”, http://heinonline.org/HOL/Page?handle=hein.journals/amuilr8&-div=9&start_page=27&collection=journals&set_as_cursor=0&men_tab=srchresults